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ember 23, 1985

Title: Keystone Bituminous Coal Association, Petitioner
V.
Nicholas DeBenedictis, Secretary, Pennsylvania
Department of Environmental Resources, et al.

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Lee, Rex E.

Counsel for respondent: Gordon, Andrew S.

try	Date	Note	Proceedings and Orders
1	Nov 14 1985		Application for extension of time to file petition and order granting same until December 24, 1985 (Brennan, November 20, 1985).
2	Dec 23 1985	G	Petition for writ of certiorari filed.
4	Jan 13 1986		Order extending time to file response to petition until February 24, 1986.
5	Feb 24 1986		Brief amicus curiae of National Coal Association, et al. filed.
6	Feb 24 1986		Brief amicus curiae of Mid-Atlantic Legal Foundation filed.
7	Feb 26 1986		DISTRIBUTED. March 21, 1986
8	Feb 27 1986	X	Brief of respondents Duncan, Peter, et al. in opposition filed.
7	Mar 3 1986		Reply brief of petitioners Keystone Bituminous, et al. filed.
7	Mar 24 1986		Petition GRANTED. ***** Record filed.
1	Apr 17 1986		Record filed.
2	Apr 16 1986		Record filed.
3	Apr 16 1986		Certified copy of appendix, briefs and partial proceedings received.
5	Apr 22 1986		Order extending time to file brief of petitioner on the merits until May 23, 1986.
6	May 22 1986		Brief amicus curiae of Pacific Legal Foundation filed.
7	May 23 1986		Joint appendix filed.
8	May 23 1986		Brief amicus curiae of National Coal Association, et al. filed.
9	May 23 1986		Brief of petitioners Keystone Bituminous, et al. filed.
0	May 23 1986		Brief amicus curiae of Mid-Atlantic Legal Foundation filed.
2	Jun 16 1986		Order extending time to file brief of respondent on the merits until July 28, 1986.
3	Jul 28 1986		Brief amicus curiae of Natl. Conference of State Legislatures filed.
4	Jul 28 1986	G	Motion of Pennsylvania State Grange, et al. for leave to file a brief as amici curiae filed.
5	Jul 28 1986		Brief amicus curiae of California, et al. filed.
5	Jul 29 1986		Brief of respondents Duncan, Peter, et al. filed.
7	Aug 6 1986		CIRCULATED.
8	Sep 24 1986		Motion of Pennsylvania State Grange, et al. for leave to file a brief as amici curiae GRANTED.

try	Date	Note	Proceedings and Orders
9	Sep 3 1986		SET FOR ARGUMENT. Monday, November 10, 1986. (2nd case) (1 hour)
0	Oct 1 1986	X Reply brief of petitioners Keystone Bituminous, et al. filed.	
1	Nov 10 1986	ARGUED.	

**PETITION
FOR WRIT OF
CERTIORARI**

85 - 1092

No.

Supreme Court, U.S.

FILED

DEC 28 1985

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

KEYSTONE BITUMINOUS COAL ASSOCIATION, HELVETIA
COAL COMPANY, ROCHESTER & PITTSBURGH COAL COM-
PANY, U.S. STEEL MINING CO., INC., UNITED STATES
STEEL CORPORATION and CONSOLIDATION COAL COMPANY,
Petitioners

v.

PETER S. DUNCAN, PHILIP ZULLO
and THOMAS B. ALEXANDER,
Respondents

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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QUESTIONS PRESENTED

1. Whether the court of appeals properly distinguished this Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), in holding that a state can compel mine operators to abandon their coal in the ground in order to serve the state's interest in economic development without violating the Takings Clause of the Fifth Amendment.

2. Whether the court of appeals correctly held that, when state legislation severely impairs a private contract, the standard of review under the Contract Clause of the Constitution is no different than the standard which governs a substantive due process challenge to such laws.

LIST OF PARTIES

The caption of the case contains the names of all parties.*

* Pursuant to Rule 28.1 of the Rules of this Court, the corporations that require disclosure because of their relationship to the individual petitioners are as follows:

Keystone Bituminous Coal Association: none

Helvetia Coal Company: none

Rochester & Pittsburgh Coal Co.: none

U. S. Steel Mining Co., Inc.: none

United States Steel Corp.: LOCAP, Inc.
LOOP Inc.

Consolidation Coal Company: E. I. Du Pont de Nemours & Co.
Conoco, Inc.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

 No.

KEYSTONE BITUMINOUS COAL ASSOCIATION, HELVETIA
 COAL COMPANY, ROCHESTER & PITTSBURGH COAL COM-
 PANY, U.S. STEEL MINING Co., INC., UNITED STATES
 STEEL CORPORATION and CONSOLIDATION COAL COMPANY,

v.

Petitioners

PETER S. DUNCAN, PHILIP ZULLO
 and THOMAS B. ALEXANDER,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
 UNITED STATES COURT OF APPEALS
 FOR THE THIRD CIRCUIT

Keystone Bituminous Coal Association, Helvetia Coal Company, Rochester & Pittsburgh Coal Company, U.S. Steel Corporation and Consolidation Coal Company, through their counsel, petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 771 F.2d 707. The opinion of the dis-

strict court (App., *infra*, 26a-42a) is reported at 581 F. Supp. 511 (W.D. Pa. 1984).

JURISDICTION

The judgment of the court of appeals (App., *infra*, 25a) was entered August 26, 1985. On November 20, 1985, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including December 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

UNITED STATES CONSTITUTIONAL PROVISIONS AND STATE STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

"[N]or shall private property be taken for public use, without just compensation."

Article I, Section 10, clause 1 of the United States Constitution provides in pertinent part:

"No State shall . . . pass any . . . law impairing the Obligations of Contracts."

Sections 4, 5(e), and 6 of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act ("Subsidence Act"), 52 Pa. Cons. Stat. Ann. § 1406.4, § 1406.5 (e) and § 1406.6, are reproduced in the appendix to this petition (App., *infra*, 49a-56a). In addition, the following state regulations: 25 Pa. Code § 89.145 and 25 Pa. Admin. Code § 89.146 ("DER Regulation"), are reproduced in the appendix to the petition (App., *infra*, 61a-65a).¹

¹ Subsequent to the filing of this lawsuit, the regulations were modified in immaterial ways and Sections 89.145 and 89.146 were consolidated and renumbered as 25 Pa. Admin. Code § 89.143. Petitioners will continue to refer to the relevant provisions as Sections 89.145 and 89.146.

STATEMENT OF THE CASE

1. Petitioners are owners of coal properties and/or operators of underground bituminous coal mines in Western Pennsylvania. App., *infra*, 4a. Almost all of the coal being mined in petitioners' mines lies beneath surface land that is not owned by petitioners. Beginning in the Nineteenth Century, petitioners pursuant to severance deeds, acquired coal properties and the contractual right to mine coal. Not only did petitioners purchase the mineral rights, but also they expressly purchased from the surface owners what Pennsylvania law recognizes as a separate property right called the support estate, which entitles them to mine and remove all coal beneath the surface lands owned by others.² Thus, petitioners acquired the right to mine all of their coal and obtained waivers from the surface owners of all claims for injuries to the surface estate caused by subsidence of the surface due to mining. *Id.* at 5a.³ These waivers, in effect, shifted the risk of subsidence, for consideration, from the coal operators to the surface owners.

Respondents are state officials responsible for enforcing Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, 52 Pa. Cons. Stat. Ann. § 1406.1 *et seq.*, and the regulations of the State Department of Environ-

² Pennsylvania property law recognizes three separate and distinct estates in land: the surface, the mineral (in this case coal) and the right of surface support (the support estate). See *Captline v. County of Allegheny*, 74 Pa. Commw. 85, 459 A.2d 1298 (1983), *cert. denied*, 104 S. Ct. 1679 (1984). Each of these state property interests can be owned by separate persons. See *Penman v. Jones*, 256 Pa. 416 (1917).

³ Mine subsidence is a phenomenon which occurs when the portion of the earth overlying an underground mine sinks or otherwise changes its configuration. Ingram, *Regulation of Mine Subsidence—Legal Issues Raised by Government Intervention in Historically Private Arrangements*, 2 Eastern Min. L. Inst. 6.01[2] (1984). See App., *infra*, 5a; C.A. App. 45a.

mental Resources ("DER") implementing the Act. Section 4 of the Act prohibits mining that causes subsidence damage to specified surface structures that were in place in 1966, such as publicly-used buildings, residential buildings and cemeteries. App., *infra*, 6a. This restriction has been expanded administratively to prohibit full extraction mining under large impoundments of water, certain aquifers and perennial streams and coal disposal areas. DER Regulation 89.145. To implement the prohibition against damage to surface structures, the DER "requires coal operators to leave 50 percent of their coal in place for support under structures and features protected" under the Act and the regulations, unless the operators can prove to the DER that less support will not result in any subsidence damage. DER Regulation 89.146 (App., *infra*, 8a). The regulation makes no provision for compensation for the operators' lost right to mine the coal used to support the surface, a right which has been expressly conveyed to the operators through contract by the surface owners.

In addition, Section 6 of the Act requires coal operators to compensate for or repair any damage to dwellings covered under Section 4 of the Act caused by mine subsidence. 52 Pa. Cons. Stat. Ann. § 1406.6. The statute completely nullifies contract provisions between coal operators and surface owners that expressly waive the surface owner's right to damages or repair in the event of subsidence.

Every mine presently being operated by petitioners has at least one protected structure on the surface over the mine. It is undisputed that, in order to comply with Pennsylvania's statute and regulations, petitioners have been and will be forced to leave approximately 30 million tons of coal in its mines (C.A. App. 99a-132a). It is similarly undisputed that no one can prove what amount of underground support will ensure against subsidence of

the surface.⁴ Subsidence is a risk no matter how much of the coal remains and no one can predict the extent of any possible damage. Accordingly, the effect of the regulation has been and will be that at least 50% of the support coal must remain unmined.

In addition, the parties stipulated that the DER's 50% requirement will make it infeasible for petitioners in certain situations to use the longwall method of coal extraction (C.A. App. 148a), which has become for most coal operators the method of underground mining of choice because it is more efficient and economical. See Nilsson & Reddy, *Continuous Miners v. Longwalls*, Coal Age 58-66 (Mar. 1983).⁵ The inability of petitioners to use this method of extraction will necessarily increase petitioners' costs of producing coal and will have a significant detrimental effect on their ability to compete economically

⁴ DER conceded in the district court that, even if petitioners leave 50% of their coal in the ground, there will nevertheless be some subsidence that can cause damage to surface structures. C. A. App. 145a. Accordingly, DER, in effect, stipulated that it is impossible to prove that there will be no subsidence if less coal is left unmined.

⁵ The court of appeals described the two underground coal mining methods used in Western Pennsylvania as follows (App., *infra*, 4a-5a):

The "room and pillar" method consists of a two-step process. During the first step, as coal is removed from the mine, blocks of coal known as pillars are left in place in a preplanned pattern to support the strata overlying the coal seam being mined. Second, when the primary mining is substantially completed in a particular area, the coal pillars are systematically removed as the mining operation retreats. . . .

The second method, known as the "longwall panel" method, also has two phases. In the first, as mining proceeds coal pillars are left in place on either side of a longwall panel of coal-laden earth. Once a series of large panels has been laid out, a piece of equipment known as a longwall miner is installed. It advances continuously through the panels removing coal.

against coal extracted from other states where this restriction is not imposed. *Ibid.*

2. Petitioners filed the instant lawsuit in the United States District Court for the Western District of Pennsylvania under 42 U.S.C. § 1983, alleging that Pennsylvania's statutes and regulations as adopted constitute a taking of petitioners' property without any provision for just compensation in violation of the Fifth Amendment⁶ and impermissibly impaired petitioners' contracts with the surface owners in violation of Article I, Section 10 of the Constitution. Petitioners sought an injunction against respondents' attempts to enforce the State's statute and regulations and a declaration that the State's scheme violated the Constitution. The district court entered a partial summary judgment for respondents (App., *infra*, 26a-42a). The court found that no disputed facts existed on the issues of whether the statute and regulations were unconstitutional as either a taking or an impairment of contract, and the court of appeals affirmed (App., *infra* 1a-23a).⁷

⁶ The prohibition against the government taking private property without just compensation has been extended to the states through the Due Process Clause of the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

⁷ On the basis of the parties' stipulation, affidavits and other undisputed evidence, the district court initially entered a final judgment for respondents. Subsequently, the Court granted petitioners' request to modify the judgment and leave open the possibility of a trial on the reasonable, investment-backed expectations of the petitioners.

The district court later granted a joint request by the parties to certify the constitutional issues decided for interlocutory review pursuant to 28 U.S.C. § 1292(b). The court expressly noted that "there is a substantial ground for a difference of opinion as to whether the above cited sections of Pennsylvania law are constitutional because a prior law dealing with the same subject matter was invalidated as unconstitutional in *Pennsylvania Coal Company v. Mahon*." App., *infra*, 47a-48a.

a. **The Takings Clause.** With respect to the taking issue, the district court acknowledged that "the instant case is factually similar to" *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), where the Court declared unconstitutional a 1921 Pennsylvania statute, the Kohler Act, which required coal operators to leave coal in the ground to support the surface. App., *infra*, 33a. But, the court reasoned that *Pennsylvania Coal* was not controlling because, in the district court's view, the Kohler Act did not serve as broad a public purpose as the more recent Pennsylvania law. App., *infra*, 33a. The district court then analyzed the State's scheme and found that the restrictions on petitioners' property rights were justified by the State's interest in the general welfare.⁸

Like the district court, the court of appeals acknowledged that the statute struck down in *Pennsylvania Coal Co. v. Mahon*, *supra*, "closely resembled parts of the Subsidence Act challenged" in this case. App., *infra*, 12a. Nevertheless, the court held that *Pennsylvania Coal* was not controlling because of the "significant differences in the respective statutes' scopes and purposes." *Id.* at 15a. The court pointed out that "[t]he Kohler Act was defended as legislation designed to protect personal safety" and not public safety. *Id.* at 13a. "In contrast, the Subsidence Act at issue here was intended to prevent common or public damage." *Id.* at 14a. More specifically, the court determined that the Subsidence Act was "designed

⁸ The district court also rejected two other claims advanced by petitioners. The first was that a provision of the Act requiring them to repair land constituted an unconstitutional impairment of contract. The second challenge was to a provision requiring coal operators to sell the support estate to the surface owners if the latter requested to purchase it. Petitioners had argued that this constituted an exercise of the state's eminent domain authority that did not serve a public purpose as required by the Fifth Amendment. App., *infra*, 41a-42a.

to protect the environment of the Commonwealth [and] its economic future" *Id.* at 14a.

With respect to the extent of the State's interference with petitioners' property rights, the court held that, state law notwithstanding (see note 2, *supra*), it would be inappropriate to analyze petitioners' right to the support estate as a distinct property interest. App., *infra*, 15a. The court then analyzed petitioners' reasonable investment-backed expectations in purchasing the state-recognized right to the support estate, and held that "a property owner's reasonable expectations as to the possible uses of his property are always circumscribed by the limitations on its use that may be imposed by the state in the public interest." *Id.* at 17a. Accordingly, balancing the governmental action against the degree of interference with petitioners' property rights, the court of appeals held that there was no unconstitutional taking. *Id.* at 18a.

b. The Contract Clause. Because the State was modifying private contracts, the district court applied a "lower level of scrutiny under the Contract Clause" using a three-step test derived from a prior Third Circuit decision. App., *infra*, 30a. See *Troy, Ltd. v. Renna*, 727 F.2d 287 (3d Cir. 1984). The district court held that the State's law unquestionably constituted a substantial impairment of petitioners' contracts. App., *infra*, 30a. The court found, however, that there is "a significant and legitimate public purpose" underlying the State's action because subsidence damage has a significant effect on land development and erodes the tax base. *Id.* at 31a. Finally, the court concluded that the legislation was reasonably related to the State's purpose. *Ibid.*

The court of appeals agreed with the district court that Pennsylvania's requirement that coal operators must pay for any injury to protected surface structures caused by subsidence substantially impaired petitioners' contract rights. Nevertheless, the court emphasized that peti-

tioners' contracts were private and therefore were subject to an extremely lenient standard of judicial review, akin to that employed by courts in reviewing economic legislation challenged on substantive due process grounds. Deferring to the State legislature's judgment as to the reasonableness of the Act, the court held that the statute's protection of surface owners was justified notwithstanding the express and voluntary contractual waivers of such claims. App., *infra*, 18a-20a.⁹

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals raises two important and recurring issues regarding the scope of a state's authority to destroy property rights without compensation and severely to impair contractual relationships between private parties. Although the Subsidence Act prevents petitioners from mining their coal and concededly impairs petitioners' contract right not to pay damages for injury to surface structures, the court held that the Act is constitutional. The decision below thus has expanded greatly the power of the states to the detriment of the specific constitutional protections of individuals embodied in the Takings Clause of the Fifth Amendment and the Impairment of Contract Clause in Article I, Section 10 of the Constitution.¹⁰ Moreover, on the Takings

⁹ The court of appeals also rejected two other claims made by petitioners. Relying on this Court's decision in *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984), it rejected petitioners' claim that the private eminent domain provision of the Subsidence Act, Section 15, 52 Pa. Cons. Stat. Ann. § 1406.15 (Purdon Supp. 1985), was, on its face, an invalid attempt to take private property for a private use. App., *infra*, 21a-23a. It also rejected petitioners' other Contract Clause claim, involving a regulation which requires coal operators to repair any subsidence damage to land *qua* land to the extent economically and technologically feasible. App., *infra*, at 21a. Petitioners do not seek review of those issues.

¹⁰ Although the posture of the case is technically interlocutory, review is warranted now for the same reasons that the district court and court of appeals concluded that immediate review under

issue, the decision conflicts with this Court's decision in *Pennsylvania Coal Co. v. Mahon*, *supra*; on the Contract Clause issue, the decision conflicts with decisions of this Court and with decisions of other courts of appeals. Accordingly, review by this Court of both questions presented is clearly warranted.

I. THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

Since the adoption of the Fifth Amendment, the requirement that just compensation must be paid when government takes private property for a public purpose has been understood primarily as an eminent domain provision. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). With the expansion of both state and federal regulation of private economic activities, however, the issue arose whether governmental regulation in the public interest that deprived an individual of the use of his property, even though the government did not formally condemn that property, nevertheless constituted a "taking" within the meaning of the Fifth Amendment. This fundamental issue was resolved in 1922 in one of this Court's leading "takings" cases, *Pennsylvania Coal Co. v. Mahon*, *supra*. The Court in that case, in an opinion by Justice Holmes, held: "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415. The Court further explained that if regulation does go "too far," then it constitutes a "taking," regardless of the State's interest. This is because "a strong public desire to improve the public con-

Section 1292(b) was warranted. The basic issue of the scope of *Pennsylvania Coal* is a pure legal issue which is critical to the outcome of this case. Moreover, because *Pennsylvania Coal* has been recognized for years as a leading case of this Court interpreting the Just Compensation Clause, immediate review by this Court of the court of appeals' narrow interpretation of *Pennsylvania Coal* is important to the development of the law of takings.

dition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

The court of appeals has nullified this landmark decision. First, the statute at issue in this case is indistinguishable from the law that was at issue in *Pennsylvania Coal*. Accordingly, the Court's specific holding in *Pennsylvania Coal* has been impermissibly vitiated. More fundamentally, in determining whether there is a "taking" in a constitutional sense, the court of appeals has interpreted this Court's opinion as adopting a balancing test between the state's interest in its regulation and the individual's property right. Until the court of appeals' decision here, *Pennsylvania Coal* was properly understood as the leading decision of this Court for the proposition that the Takings Clause looked at the impact of the state's regulation on the individual's rights rather than at the strength of the state's interest in taking the property. See *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978). Because the *Pennsylvania Coal* decision deals specifically with coal mining and the state's power to restrict the amount of coal mined, clarification by this Court of its continuing precedential validity is essential to guide federal¹¹ and state governments and the nation's coal industry in ascertaining whether and to what extent long-standing private relationships can be constitutionally altered by state action.¹²

¹¹ The Federal Surface Mining and Conservation Act, 30 U.S.C. §1201, *et seq.* requires states which wish to obtain exclusive jurisdiction to regulate coal mining to adopt a regulatory program that is in accord with the Act and consistent with regulatory guidelines promulgated by the Department of Interior, Office of Surface Mining ("OSM"). 30 U.S.C. § 1253. The United States Department of Interior is presently reconsidering its regulations governing the subsidence effects of underground coal mining which will almost certainly be affected by the court of appeals' interpretation of *Pennsylvania Coal*. See 50 Fed. Reg. 27910 (1985).

¹² The Department of Interior has wrestled with the meaning and scope of *Pennsylvania Coal* previously in various contexts. For

The court of appeals' decision also requires review because it has significantly undervalued petitioners' property rights. First, the court of appeals completely disregarded the State's determination that the support estate obtained by petitioners is a distinct property right; this holding directly conflicts with decisions of this Court that "property" for Fifth Amendment purposes is defined by state law. Second, contrary to prior decisions of this Court,¹³ the court of appeals has nullified investment-backed expectations as a factor in all takings cases by holding that the reasonableness of such expectations is conditioned on the state's subsequent determination of how best to serve the public interest.

A. In *Pennsylvania Coal Co. v. Mahon*, Pennsylvania surface owners who did not own the coal beneath their property or the support estate brought an action to enjoin the Pennsylvania Coal Company from mining coal "in such way as to cause the subsidence of . . . any structure used as a human habitation. . . ." 260 U.S. at 412-413. Specifically relying upon Section 1(d) of the State's Kohler Act, the plaintiffs in *Pennsylvania Coal* sought to forbid "[t]he use to which [Pennsylvania Coal Company] wish[ed] to put the support estate"—to mine as much coal as the operators could safely mine—which is precisely what petitioners seek to do here and what the

example, *Pennsylvania Coal* was a factor which was considered when OSM promulgated rules relating to areas designated as unsuitable for coal mining activity. See 44 Fed. Reg. 14991-14992 (1979), 47 Fed. Reg. 25278-25306 (1982). *Pennsylvania Coal* was also a factor OSM considered when determining if mining could be authorized on federal lands. See 49 Fed. Reg. 31228 (1984). OSM has also expressed concern about the constitutionality of its original surface owner protection regulations which imposed requirements similar to the ones imposed by respondents. See 48 Fed. Reg. 24635 (1983).

¹³ See, e.g., *Penn Central Transportation Co. v. New York City*, 438 U.S. at 124.

State has prohibited. Both cases involve an identical "physical restriction against the removal of coal." *Andrus v. Allard*, 444 U.S. 51, 66 n.22 (1979). Thus, not only is the language of the Kohler Act's support requirement indistinguishable from the language of the current support requirement (see App., *infra*, 49a-61a; reproducing both statutes), its effect upon the rights of coal operators, in general, and petitioners, in particular, is identical. Both the Kohler Act and the current support requirements "destroy previously existing rights of property and contract . . ." 260 U.S. at 413.¹⁴

The primary distinction offered by the court of appeals was that *Pennsylvania Coal* involved a statute supported by a very limited public purpose—to protect the safety of some individuals on the surface.¹⁵ But this character-

¹⁴ Before the trial court in *Pennsylvania Coal*, the parties rested on their pleadings. Consequently, the record in *Pennsylvania Coal* contained no evidence on lost tonnage, lost profits or other financial injury. However, the pleadings in *Pennsylvania Coal* did establish that the Pennsylvania Coal Company had for several years prior to the filing of the complaint mined, removed and sold their coal which lay beneath the Mahon's premises. Transcript of the Record at 9, 13, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

¹⁵ The court of appeals' rationale for this conclusion is plainly inadequate. First, the court pointed out that the *Pennsylvania Coal* case involved only a single house (App., *infra*, 12a). But this Court in *Pennsylvania Coal* explained that the Pennsylvania Attorney General and the City of Scranton had participated in the briefing of that case to present the State's interest and the Court took into account the broader public interest served by the statute in holding that it was unconstitutional. 260 U.S. at 414.

Second, the court of appeals pointed out that the present statute, by contrast to the Kohler Act, contains no exception for the situation where the surface is owned by the owner of the mineral rights and support estate. The court of appeals ignored the proviso in Section 4 of the Subsidence Act, which allows the owner of the surface to waive his right to have his surface supported. 52 Pa. Cons. Stat. Ann. § 1406.4. Obviously, if the coal operator or owner also owns the surface, he will invoke this provision. Therefore, both statutes in effect contain precisely the same exception.

ization directly conflicts with this Court's own recognition that *Pennsylvania Coal* is "the leading case for the proposition that a state statute that *substantially furthers important public policies* may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978) (emphasis added).

If the present statute had been invoked by the Mahons in 1921 as a basis for seeking an injunction against the Pennsylvania Coal Company from mining under their property, there simply is no basis for doubting that the result in that case would have been unchanged. This significant retreat from a holding as important as *Pennsylvania Coal* should come, if at all, only from this Court.¹⁶

B. The holding below that *Pennsylvania Coal* permits a balancing of government and private interests in determining whether there has been a taking conflicts directly with the Court's statement in *Pennsylvania Coal* that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 260 U.S. at 416.

¹⁶ The court of appeals also tried to distinguish *Pennsylvania Coal* on the ground that the impact of the Kohler Act on property rights was significantly greater than the effect of the current laws. But this is manifestly wrong. The Court in *Pennsylvania Coal* described the loss in terms that apply equally to this case—the state "purports to abolish [the support estate which] is recognized in Pennsylvania as an estate in land—a very valuable estate. . . ." 260 U.S. 414. Later, the Court pointed out that "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Ibid.* It is undisputed in this case, however, that the effect of the 50% requirement is to make it impractical in many instances to use longwall mining, which means that it will be "commercially impracticable to mine certain coal." Moreover, 100% of petitioners' support estate is destroyed each time the requirement is applied. Therefore, *Pennsylvania Coal* cannot be distinguished in terms of the effect on property rights.

The holding below not only conflicts with *Pennsylvania Coal*, it also raises the more basic issue of whether a balancing test is appropriate under the Takings Clause. In its most comprehensive recent treatment of the Takings Clause, this Court defined a regulatory taking in terms of three factors—diminution of the property's economic value, interference with distinct investment-backed expectations and the character of the government's action in the sense of whether there has been a physical invasion of the property.¹⁷ *Penn Central Transportation Co. v. New York City*, 438 U.S. at 124. See *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). All three of these factors relate only to the impact of the state's regulation on the individual's property interest. Nowhere in that inquiry did the Court indicate that a taking depended upon the importance of the state's interest. See *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1332 (9th Cir. 1977) (state must pay for taking even if exercising legitimate police power).

This Court in dicta has, however, indicated that a taking may depend upon a balance of the state and individual interests. In *Agins v. Tiburon*, 447 U.S. 255, 261 (1980), the Court noted that in determining "when property has been taken, . . . the question necessarily requires a weighing of private and public interests." See also *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980). The Court has not indicated, however, precisely when, if at all, this balancing test operates.

This case presents an excellent vehicle for clarifying the relationship between *Pennsylvania Coal* and some of the more recent statements by this Court. In this case the State's regulatory scheme causes a complete destruc-

¹⁷ The character of the state's action does not include an analysis of the magnitude of the state's interest. Instead, it refers only to whether the state is physically invading the individual's property, which constitutes a taking without any further inquiry. See *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419 (1982).

tion of a distinct property interest (the support estate). If the appropriate focus is primarily upon the impact of the regulation on the individual's property rights, Pennsylvania's law unquestionably goes "too far," and is unconstitutional as an uncompensated taking. The extent to which it is nevertheless appropriate, despite the Court's statements in *Pennsylvania Coal* to the contrary, to balance the State's interest in regulating petitioner's property in deciding whether Pennsylvania should pay anything for that property is a crucial, but unsettled question that should be resolved by this Court.

C. Not only did the court of appeals analyze the basic taking question improperly by weighing the State's interest much too heavily, but it also significantly undervalued petitioners' property rights. Pennsylvania clearly recognizes the support estate as a separate property interest,¹⁸ but the court of appeals simply disregarded that fact and held that no purpose would be served by respecting the State's definition of petitioners' interest. The court's analysis of Pennsylvania property law governing the support estate is completely inconsistent with this Court's analysis of that same property right in *Pennsylvania Coal*. 260 U.S. at 414. More generally, the court of appeals' reasoning is fundamentally at odds with numerous decisions of this Court, which recognize that property rights within the meaning of the Fifth Amendment's Just Compensation Clause are defined by state law

¹⁸ Although Pennsylvania has accorded the right to support coal a place of particular prominence in its property law by recognizing the right as an estate in land, underground coal operators in other major coal producing states also have purchased mining rights which entitle them to mine and remove all the coal beneath the surface lands of others without liability for any resulting surface subsidence damage. See, e.g., *Paull v. Island Coal Co.*, 44 Ind. App. 218, 88 N.E. 949 (Ind. 1909); *Tankersley v. Peabody Coal Co.* 195 N.E.2d 402 (Ill. App. 1974), *aff'd*, 202 N.E.2d (Ill. 1974); *Ohio Collieries v. Cocke*, 107 Ohio St. 238, 140 N.E. 356 (Ohio 1923); *Winnings v. Wilpen Coal Co.*, 59 S.E.2d 655 (W. Va. App. 1950).

and that federal courts in a takings case have no authority to disregard those definitions. See, e.g., *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2872 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *United States v. Causby*, 328 U.S. 256, 266 (1946).¹⁹

If the court of appeals had properly respected state law, it could not have avoided the conclusion that Pennsylvania has taken petitioners' property. By ignoring state law, however, the court of appeals was able to disregard completely the distinct, property right that the State through its subsidence regulations has abolished.

D. Finally, the court of appeals' analysis of petitioners' investment-backed expectations has in effect eliminated that factor as a basis for finding a taking, which is flatly inconsistent with the emphasis placed upon that factor in this Court's decision in *Penn Central Transportation Co. v. New York City*, 438 U.S. at 124. Moreover, the reasoning is wholly inconsistent with the holding in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

Coal operators in Pennsylvania purchased the support estate for the purpose of maximizing their flexibility for the future in employing mining techniques and ensuring maximum coal extraction consistent with the safety of their employees. To these ends, petitioners and other coal operators purchased a separate property right in order to shift the risk of subsidence damage from themselves to the surface owners. Indeed, these purchases were indirectly encouraged by Pennsylvania because of its recognition of a distinct property right available to allo-

¹⁹ Nor is there any basis for concluding that, because petitioners' right to the support estate is less than a fee simple interest in the land, that interest is "something less than property." *United States v. Security Industrial Bank*, 459 U.S. 70, 76 (1982). See *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (security interest taken); *Armstrong v. United States*, 364 U.S. 40 (1960) (materialman's lien taken).

cate that risk. Compare *Kaiser Aetna v. United States*, 444 U.S. at 179.

In order to avoid the conclusion that Pennsylvania had frustrated completely petitioners' reasonable investment-backed expectation that they could mine their coal, the court of appeals held that petitioners' expectations "are always circumscribed by the limitations on its use that may be imposed by the state in the public interest." App., *infra*, 17a. This holding, however, cannot be squared with this Court's analysis in *Kaiser Aetna*. In that case, the Court held that the federal government had "taken" a developer's marina by ordering public access to it after the developer had invested in dredging a pond to connect it with a navigable waterway of the United States. The Court held that the federal government could not deprive the developer of the value of his investment without compensating him for the loss. Under the reasoning of the Third Circuit in this case, the developer would not have had any legitimate expectation concerning the use of the marina in light of the federal government's underlying right of navigation, and therefore, there would not have been a taking. Plenary review is therefore warranted to determine what investment-backed expectations are properly protected from uncompensated takings by state governments.²⁰

²⁰ This Court has noted probable jurisdiction in *MacDonald, Sommer & Frates v. County of Yolo*, No. 84-2015 (prob. juris. noted Oct. 31, 1985), which raises the issues of whether zoning regulations can be so oppressive as to constitute a "taking" and whether such a taking must be compensated under the Fifth Amendment.

The Court should grant this petition without awaiting the outcome of *County of Yolo*. The issue posed in this case is different from that one. There is no question that the State has deprived petitioners of the use of a distinct property right; petitioners' support estate has been eliminated. The issue here is whether a Court should balance the public and private interests involved or instead look solely at the impact of the law on the individual's property right in deciding whether there has been a taking. Nor is there any question posed here concerning compensation; petitioners

II. THE CONTRACT CLAUSE OF ARTICLE I, SECTION 10

The court of appeals effectively repealed the Contract Clause as it applies to state laws severely impairing the contracts of private parties. U.S. Const. Art. I, § 10, cl. 1 ("no State shall . . . pass any . . . Law impairing the Obligation of Contracts"). Because the State was not a party to the contracts at issue in this case, the Third Circuit concluded that it should "defer to the legislative judgment as to the reasonableness of the particular measure, as is customary in reviewing economic and social regulations in other contexts." (App., *infra*, 19a; emphasis added.) The court only inquired whether Section 6 was rationally related to a legitimate governmental purpose, and it thus applied a deferential, standard of review identical to the standard of review which governs substantive challenges to state laws brought under the Due Process Clause of the 14th Amendment. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (highly deferential standard of review under substantive due process).

In so doing, the court of appeals committed fundamental constitutional error. When, as here, a state severely impairs a contract between private parties, the proper Contract Clause standard of review is the "reasonable and necessary" test developed in the seminal case of *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) and reaffirmed recently in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). As this Court has stated:

As with laws impairing the obligations of private contracts, an impairment [of state contracts] may be constitutional if it is *reasonable and necessary* to serve an important public purpose.

U.S. Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977). This test is clearly more stringent than the deferential,

seek only injunctive relief. Finally, as discussed below, petitioners present a substantial Contract Clause question which will not be affected by the Court's disposition of *County of Yolo*.

rational-relationship, substantive-due-process test for reviewing state economic regulation. See, e.g. *Spannaus*, 438 U.S. at 242-244 (Contract Clause not rendered a "dead letter" by the Due Process Clause).

Plenary review is thus required because the decision below squarely conflicts with the decisions of this Court. Review is also warranted because the court of appeals decision is in conflict with the decisions of other circuits which have properly applied the *Blaisdell-Spannaus* test in striking down state laws severely impairing private contracts.

A. The issue of the proper Contract Clause standard of review is clearly and sharply presented because it was conceded below that the contracts at issue were severely and retroactively impaired. During the late 19th Century and early 20th Century, the surface land owners, by express contract, sold the mineral and support estate to petitioners and waived their rights to collect damages for any non-intentional harm to surface structures caused by mine subsidence. Section 6 of the Subsidence Act provides that, if mining operations cause "damage to structures set forth in Section 4" of the Act, then the mine operator must either repair all damage to such structures or pay "all claims" arising from such damage. 52 Pa. Const. Stat. Ann. § 1406.6. This statutory provision nullifies, not just modifies, an important contractual term and causes "substantial impairment" in a constitutional sense.²¹ Although the mine operators reasonably expected

²¹ Both courts below recognized as much. See App., *infra*, 19a, 30a.

The language in the deeds waiving the surface owner's right to the support estate could not be clearer (C.A. App. 162a):

Together with the right to mine and remove all of said coal without being required to provide or leave support for the overlying strata or surface, and without being liable for any injury to the said overlying land or to the structures thereon, or the springs or water courses therein or thereon, by reason

that the surface owners would bear the cost of any damage caused by subsidence, the statute destroys that expectation by shifting the cost burden to the mine operators alone. *Spannaus*, *supra*, 438 U.S. at 240, 246-48; *U.S. Trust Co. v. New Jersey*, U.S. 1, 19-21, n.7 (1977).

B. The severe impairment of petitioners' contract rights—indeed, their complete destruction—triggers a searching review of Section 6 under the Contract Clause's "reasonable and necessary" test applied by this Court in the context of state impairments of private contracts. As this Court ruled in *Spannaus*, 438 U.S. at 245 (emphasis supplied; footnote omitted),

The severity of the impairment [of private contracts] measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment will push the inquiry to a careful examination of the nature and purpose of the state legislation.

1. With respect to the "reasonableness" element of the test, the state must first show that the contract had consequences which created problems of public policy unforeseen when the contract was executed. *Spannaus*, 438 U.S. at 426-27; *U.S. Trust Co.*, 431 U.S. at 31-32. The constitutional requirement that a state justify an impairing law by demonstrating that unforeseen developments had occurred is a core principle of this Court's Contract Clause adjudication which has sought to reconcile the tension between the Clause's absolute language protecting reliance interests of contracting parties and the interests of states in exercising their sovereign powers in light

of the mining and removing of said coal, or other coal on land adjacent thereto

It is estimated that approximately 90 percent of petitioners' mining operations covered by Section 6 of the Act involved such express contractual waivers from the owners of the surface estate, or their successors, heirs or assigns. C.A. App. 151a.

of unforeseen and dramatically changed circumstances.²² Yet the court of appeals in this case committed fundamental constitutional error because it never even made an inquiry into whether the state law destroying contractual rights and shifting the costs of subsidence damage from surface owners to mine owners was responding to an unforeseen problem.²³

Second, even if the state proves significant, unforeseen developments, it must show that an impairing law is reasonable in light of the "changed" circumstances because the law satisfies criteria set out in *Blaisdell* and then reaffirmed and augmented in *Spannaus*.²⁴ Yet the court of appeals again committed fundamental error because it never considered the "reasonableness" of Section 6 of the Subsidence Act under the express criteria established by this Court in *Blaisdell* and *Spannaus*. Indeed, it never even cited those leading cases.

2. The "necessity" part of the "reasonable and necessary" test has a different purpose and a different focus. This Court made clear in *Spannaus* that where, as here, there has been a complete destruction of private contrac-

²² See *El Paso v. Simmons*, 379 U.S. 497, 515 (1965), and cases cited therein.

²³ Such a showing would have been difficult because the issue of who should bear such costs has been germane in Pennsylvania since underground mining began in the 19th Century. The purpose of the Subsidence Act is stated in two pages of findings included in the Act itself (App., *infra*, 33a-34a). No mention is made in these findings of the occurrence of *unforeseen* events which would justify an impairment of contract.

²⁴ The state law (a) must be enacted to deal with a broad generalized economic problem; (b) must, as a corollary, be enacted to protect a broad societal interest rather than a narrow class; (c) should, if possible, be limited in duration; and (d) must not modify contracts without moderation or in the spirit of oppression. *Blaisdell*, 290 U.S. at 444-47; *Spannaus*, 438 U.S. 248-51. See also *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410, n.11 (1983).

tual rights by state law, the presumption usually accorded state legislation does not apply. *Spannaus*, 438 U.S. at 247. Accordingly, the necessity requirement examines the appropriateness of what the state has done to achieve its objective. Such inquiries include whether the state law was appropriately tailored to the problems it was designed to meet, *Blaisdell*, 290 U.S. at 444-45, and whether the state could not have achieved its legitimate objectives in alternative ways less damaging to contractual expectations. *Spannaus*, 438 U.S. at 247, 250.²⁵

The court of appeals in this case completely ignored the requirement of this Court that an inquiry into the "necessity" of Section 6 of the Subsidence Act must occur before that provision, which severely impairs contract rights, can pass Contract Clause muster. In so doing, the court of appeals' analysis again directly conflicts with the relevant decisions of this Court.²⁶

C. Plenary review is required not only to resolve conflicts between the decisions of this Court and the court of appeals but also to clarify that this Court's decision in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983), did not, *sub silentio*, reject or modify the *Blaisdell-Spannaus* "reasonable and neces-

²⁵ In *Spannaus*, this Court cited the lack of a grace period and the fact that the state law was not of limited duration as relevant factors in its holding that a Minnesota law changing pension fund obligations was invalid under the Contract Clause. The state law could, therefore, have achieved its objectives in ways less damaging to contract rights.

²⁶ Section 6 of the Subsidence Act was not "necessary" in a constitutional sense because other means already existed under state law for accomplishing the state's goals of preserving land and preserving the tax base. The state sponsored insurance system, which held premiums to relatively small amounts, afforded affected surface land owners a means of repairing any subsidence damage to their structures without imposing an unexpected cost burden on petitioners. See Act of August 23, 1961, P.L. 1068, *as amended*, 52 Pa. Cons. Stat. Ann. §§ 3201, *et seq.* (Purdon 1985).

sary" test as applied to severe impairments of private contracts. This issue is raised because the court of appeals erroneously relied on a single sentence in *Energy Reserves* for its overly deferential approach to impairing state laws under the Contract Clause. (App., *infra*, 19a). But, this Court in *Energy Reserves* was only saying that the Contract Clause test which applies when the state is a party is more stringent than the Contract Clause test which applies when the contract is between private parties. The Court in *Energy Reserves* did not purport to modify or reject in any way the *Blaisdell-Spannaus* "reasonable and necessary" test because the basic holding in *Energy Reserves* was that there was no substantial impairment of contract.²⁷ 459 U.S. 413-416.²⁸ Nor did the *Energy Reserves* Court modify the basic proposition of

²⁷ In *Energy Reserves*, this Court was simply quoting from *U.S. Trust Co. v. New Jersey*, 459 U.S. at 413. But the quotation arises in this Court's discussion in *U.S. Trust* of the "reserved powers doctrine." Under this doctrine, there are certain state powers which constitute implied terms of all contracts entered into by state entities and which thus cannot be contracted away by the state. A state law within the scope of the "reserved powers doctrine" is outside the strictures of the Contract Clause and need not be justified. *Blaisdell*, 290 U.S. at 435. Thus, the sentence of this Court's opinion in *U.S. Trust Co.* quoted in *Energy Reserves* did not even involve interpretation of the Contract Clause's "reasonable and necessary" test, which only is triggered if, as here, the "reserved powers doctrine" does not apply.

²⁸ To the extent the Court reached the question of whether the state law could be justified under the Contract Clause standard of review, *Energy Reserves* is sharply different from this case, and from *Spannaus*, because the impairment was at best minimal, not substantial (as in *Spannaus*) or total (as in this case), thus triggering a minimal level of scrutiny.

Three members of the Court—the Chief Justice, Justice Powell and Justice Rehnquist—declined in *Energy Reserves* to address the appropriate substantive standard of Contract Clause review when state law impairs the contract of private parties. They left further interpretation of that standard—and of *Blaisdell* and *Spannaus*—to another day. 459 U.S. at 421.

Spannaus that the Contract Clause, when applied to severe impairments of private contracts, was not as deferential to state law as the Due Process Clause. 438 U.S. at 242-244.

Only last term, this Court stated that, when "the court reviews state economic legislation [under the Contract Clause] the inquiry will not necessarily be the same," as the lenient standards applied to due process challenges to economic legislation. *National Railroad Passenger Corporation v. Atchison, T. & S. F. Ry.*, 105 S.Ct. 1441, 1455 n.25 (1985). Indeed, this Court emphasized (*id.*),

As we made clear in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. —, — 104 S.Ct. 2709, . . . (1984), we have never held that the principles embodied in the Fifth Amendment's due process guarantee are coextensive with the prohibitions against state impairments of contracts under the Contract Clause, and, we observed, to the extent standards differ, a less searching inquiry occurs in the review of federal economic legislation.

Accordingly, plenary consideration is warranted to clarify the impact of *Energy Reserves* on this Court's Contract Clause standard for reviewing the validity of state laws which impair private contracts.

D. Plenary review should also be granted because there is a clear conflict among the circuits regarding application of the "reasonable and necessary" test to the contracts of private parties. In *Minnesota Ass'n of Health Care Facilities v. Minnesota Dept. of Public Welfare*, 742 F.2d 442, 451 (8th Cir. 1984), *cert. denied*, 105 S.Ct. 1191 (1985), the Eighth Circuit, relying on *Blaisdell* and *Spannaus*, invalidated a state statute which retroactively interfered with the private contract between nursing homes and their patients. The State law imposed a totally unexpected requirement on nursing homes that they pay back a portion of the charges that were permitted by law when collected. There is no ques-

tion that the Minnesota law would have passed muster under the standards employed by the Third Circuit because the statute was certainly rationally related to the State's legitimate interest in holding down medical costs.

Similarly, the decision here is in conflict with decisions of both the Ninth Circuit and the Fourth Circuit which have also recently relied on the "reasonable and necessary" test of *Blaisdell* and *Spannaus* to strike down state statutes substantially impairing contracts between private parties which would have been sustained under the mere "rational relationship" standard used by the court of appeals in this case.²⁹ And, as the Seventh Circuit recently noted, after *Energy Reserves* was decided:

Our review of due process clause and the contract clause jurisprudence convinces us that these two constitutional provisions are by no means coextensive and rightly must be considered distinct. . . . [W]e may not simply take the rash step of erasing the lines of demarcation between these two fundamental, far reaching and *distinct* constitutional provisions—certainly not without a much clearer directive on this subject from the Supreme Court. (emphasis in original; footnotes omitted.)³⁰

The court of appeals in this case has impermissibly "erased the line of demarcation between" the Contract

²⁹ See *LaFortune v. Naval Weapons Center Federal Credit Union*, 652 F.2d 842, 846-48 (9th Cir. 1981) (Contract Cause's reasonable and necessary test prohibited retroactive application of California dwelling home exemption); *Garris v. Hanover Insurance Co.*, 630 F.2d 1001, 1008-1011 (4th Cir. 1980) (Contract Clause's reasonable and necessary test prohibits retroactive application of private enforcement provision of state statute).

³⁰ *Peick v. Pension Benefit Guaranty Corp.*, 724 F.2d 1247, 1264 (7th Cir. 1983). This case involved a contract between an entity of the federal government and a private party. Nonetheless, the passage quoted above indicates a clear conflict in the approach taken by the Seventh Circuit towards questions of contract clause adjudication and the approach taken by the court of appeals in this case, approaches which would yield different results in similar cases.

Clause and the Due Process Clause. Under the court of appeals' reading, virtually no contract between private parties is immune from impairment by the states. This result is demonstrably forbidden by the separate and explicit placement of the Contract Clause in Article I of the Constitution, and by the decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3406

KEYSTONE BITUMINOUS COAL ASSN., a Pennsylvania unincorporated association of bituminous coal producers, individually and as represented by certain of its member companies; HELVETIA COAL COMPANY, a Pennsylvania corporation; ROCHESTER & PITTSBURGH COAL COMPANY, a Pennsylvania corporation; U.S. STEEL MINING Co., INC., a Delaware corporation, individually and as a trustee *ad litem* for KEYSTONE BITUMINOUS COAL ASSN.; UNITED STATES STEEL CORPORATION, a Delaware corporation; and CONSOLIDATION COAL COMPANY, a Delaware corporation,

Appellants

v.

PETER S. DUNCAN, indiv. and in his capacity as Secretary of the Commonwealth of Penna. Dept. of Environmental Resources, PHILIP ZULLO, indiv. and in his capacity as Chief, Div. of Mine Subsidence of the Bureau of Mining and Reclamation of the Comm. of Penna., Dept. of Environmental Resources, and THOMAS B. ALEXANDER, indiv. and in his capacity as Chief, Section of Mine Subsidence Regulation of the Div. of Mine Subsidence of the Bureau of Mining and Reclamation of the Comm. of Penna., Dept. of Environmental Resources.

On Appeal from the United States District Court for
the Western District of Pennsylvania
(C. A. No. 82-2712)

Argued February 27, 1985

Before: ADAMS, WEIS and WISDOM,*
Circuit Judges

(Filed August 26, 1985)

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* Hon. John Minor Wisdom, U.S. Court of Appeals for the Fifth Circuit, sitting by designation.

OPINION OF THE COURT

ADAMS, *Circuit Judge*

Various owners and operators of bituminous coal mines brought suit pursuant to 42 U.S.C. § 1983 (1982) challenging the constitutionality of state statutes and regulations governing the mining of coal in Pennsylvania. The district court granted summary judgment for defendants, holding that the state program violated neither the takings clause nor the contract clause of the Constitution, and was not an invalid exercise of the power of eminent domain. We agree with the district court, and accordingly affirm.

I

A.

Plaintiffs¹ sought in an action in the district court to have several provisions of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, 52 Pa. Cons. Stat. Ann. § 1406.1 (Purdon Supp. 1984-85) (Subsidence Act), and its implementing regulations promulgated by the state Department of Environmental Resources (DER), declared unconstitutional. Named as defendants were those officials of the DER responsible for administering the Act.²

¹ Plaintiffs are Keystone Bituminous Coal Association, an unincorporated association of bituminous coal producers, Helvetia Coal Company, Rochester & Pittsburgh Coal Company, U.S. Steel Mining Company, United States Steel Corporation, and Consolidated Coal Company.

² Defendants are Peter Duncan, the former Secretary of the DER, Phillip Zullo, Chief of the DER's Division of Mine Subsidence, and Thomas B. Alexander, Chief of DER's Section of Mine Subsidence Regulation.

In February 1984, following pretrial proceedings designed to narrow the factual and legal issues, the district court denied plaintiffs' motion for summary judgment, granted the DER partial summary judgment and dismissed the complaint. As a consequence of post-trial motions the matter was reopened and upon joint request of the parties, the district court certified several issues for appeal and stayed further proceedings in the district court.³ We accepted jurisdiction pursuant to 28 U.S.C. § 1292(b) (1982).⁴

B.

Plaintiffs operate full extraction underground bituminous coal mines in Western Pennsylvania, generally employing two different mining methods. The "room and pillar" method consists of a two-step process. During the first step, as coal is removed from the mine, blocks of coal known as pillars are left in place in a pre-planned pattern to support the strata overlying the coal seam being mined. Second, when the primary mining is substantially completed in a particular area, the coal pillars are systematically removed as the mining operation retreats. Operators seek to remove as many coal pillars as possible, consistent with safety.

The second method, known as the "longwall panel" method, also has two phases. In the first, as mining pro-

³ Plaintiffs challenged the statutes on their face and as applied. The as-applied challenge remains for disposition in the district court.

⁴ We reject the defendants' claim that the district court was without jurisdiction to decide plaintiffs suit. Plaintiffs seek to challenge, not the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.* (1982 and Supp. 1983), but the Pennsylvania program enacted and approved pursuant to the federal act. Therefore, 30 U.S.C. § 1276(a)(1), conferring jurisdiction over challenges to the implementation of the federal act upon the district courts for the District of Columbia and the Middle District of Pennsylvania, did not leave the district court without jurisdiction to entertain this suit.

ceeds coal pillars are left in place on either side of a longwall panel of coal-laden earth. Once a series of large panels has been laid out, a piece of equipment known as a longwall miner is installed. It advances continuously through the panels removing coal.

For purposes of this litigation, the mineralogical fact of most significance is that subsidence—the lowering of the strata overlying a coal mine because of underground coal extraction—eventually results from both forms of coal mining. App. at 45. A substantial amount of the coal reserves in the mines operated by plaintiffs lies beneath buildings and other features located on land whose surface is owned by others.⁵ Predominantly during the period 1890-1920, plaintiffs purchased from land owners the rights to mine and remove this coal. They also regularly secured waivers of the surface owners' rights to collect damages for harm to the surface or surface structures caused by subsidence.

C.

In 1966, Pennsylvania passed the Subsidence Act which, with later amendments and implementing regulations, creates a comprehensive arrangement governing bituminous coal mining in Pennsylvania. The present state program is in part a response to the federal Surface Mining Control and Reclamation Act of 1979, 30 U.S.C. §§ 1201 *et seq.* (1982 and Supp. 1983). The federal act provides that a state may assume primary control over mine reclamation activities within its borders by adopting a regulatory scheme at least as stringent as the minimum guidelines set forth in the federal laws. Pennsylvania's program was eventually approved under this scheme. See 30 C.F.R. §§ 938.1-.20 (1983).

⁵ Pennsylvania property law recognizes three estates in land: the surface estate, the support estate, and the mineral estate. See *Captline v. County of Allegheny*, 74 Pa. Super. 85, 459 A.2d 1298 (1983), *cert. denied*, 104 S. Ct. 1679 (1984).

An original purpose of the state law was to preserve land in Pennsylvania, thus promoting the health, safety, and welfare of the people of the Commonwealth. An additional purpose was the preservation of a tax base for certain municipalities in order to enhance the Commonwealth's economic welfare. 52 Pa. Cons. Stat. Ann. § 1406.3.

Plaintiffs challenge four aspects of the Subsidence Act. Section 4 and various Subsidence Regulations implementing both section 4 and section 5 require coal mine operators to leave a certain amount of coal in the ground for support under specified types of surface structures. These provisions apply notwithstanding an operator's ownership of mineral rights or support rights. It is alleged that these provisions abridge the takings clause of the Constitution, U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"), and specifically the holding of the Supreme Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

Also challenged by the plaintiffs is the validity of section 6 of the Subsidence Act, which requires mine operators to pay compensation for subsidence damage to various structures, notwithstanding the existence of a damage waiver executed by the surface owner. In this regard, claims are raised under the contract clause, U.S. Const. art. I, § 10, cl. 1, as well as the takings clause of the Constitution.

Similarly plaintiffs urge a regulation requiring mine operators to repair any damage to surface land caused by subsidence to the extent technically feasible, 25 Pa. Admin. Code § 89.147(b) (Shepard's 1985), violates the contract clause. Finally, section 15 of the Subsidence Act, which gives surface owners a right to purchase underlying coal for support notwithstanding a waiver of the right of support, is claimed to be an invalid exercise

of the power of eminent domain in violation of the Fourteenth Amendment. The district court rejected all four of the plaintiffs' asserted grounds for relief. We address each contention in turn.

II

A.

Section 4 of the Subsidence Act, 52 Pa. Cons. Stat. Ann. § 1406.4, prohibits mine operators from mining "bituminous coal so as to cause damage as a result of the caving-in, collapse or subsidence of the following surface structures in place on April 27, 1966" in the proximity of a mine:

(1) Any public building or any noncommercial structure customarily used by the public, including but not being limited to churches, schools, hospitals, and municipal utilities or municipal public service operations.

(2) Any dwelling used for human habitation; and

(3) Any cemetery or public burial ground; unless the current owner of the structure consents and the resulting damage is fully repaired or compensated.

Pursuant to the legislation, § 89.145 of the DER regulations repeats the section 4 list of protected structures, and adds:

(4) perennial streams and impoundments with a storage volume exceeding 20 acre feet;

(5) aquifers which serve as a significant source of water supply to any public water system; and

(6) coal refuse deposited under requirements of Chapter 90 (relating to coal refuse disposal).

25 Pa. Admin. Code § 89.145 (Shepard's 1985).

Section 5(e) of the Act requires that, in order to prevent subsidence causing material damage, mine operators must adopt technologically and economically feasible measures to maximize mine stability and maintain the value and reasonably foreseeable uses of surface land. Accompanying regulations specify that, at a minimum, the measures adopted must consist of the following:

(1) For each structure or feature to be protected, the operator shall provide a support area in which the amount of extraction is limited to 50%, leaving for support pillars of coal of a size and in a pattern which maximize bearing strength and are approved by the Department. No mining is permitted beneath a structure where the depth of overburden is less than 100 feet.

25 Pa. Admin. Code § 89.146(b)(1) (Shepard's 1985).

Plaintiffs assert that these support requirements transgress the takings clause, relying particularly on *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

B.

The Constitution guarantees that private property shall not be taken for public use without just compensation. The Supreme Court, however, has not adopted a single precise formula for determining when a challenged government action is properly characterized as a taking. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). The inquiry turns on the particular circumstances of each case, *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958), with special emphasis on the character of the government action and the degree of interference with the private property. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-84 (1980). While the takings analysis thus involves an "essentially ad hoc, factual inquiry," *Penn*

Central, 438 U.S. at 124, several general propositions emerge from the Supreme Court's decisions in this area.

Respecting the character of the government action, the Court has stated that a "taking may more readily be found when the interference with property can be characterized as a physical invasion by government. . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* The concept of governmental invasion or occupation of property now encompasses certain government acts causing a direct and sustained interference with the use of property. Thus, in *Kaiser Aetna*, the owner of a private pond in Hawaii had dug an inlet through a barrier beach to form a private marina with access to the bay. The government claimed that the lagoon had become part of the navigational waterways and must be open to the public. The Supreme Court held that the imposition of this navigational servitude was an "actual physical invasion" and thus a taking which required compensation. 444 U.S. 179-80. A more traditional physical occupation was present in *Loretta v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). There the Court found a New York statute forcing a landlord to permit installation of cable facilities on private property to be a taking.

A taking may also occur despite the absence of any form of physical occupation. Pursuant to its police powers the state may regulate the uses of property to promote the public good. In instances in which a state "reasonably concluded that the 'health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land," the Supreme Court has upheld regulations that "destroyed or adversely affected recognized real property interests." *Penn Central*, 438 U.S. at 125; *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928).

Nevertheless, when "regulation reaches a certain magnitude" there may be a taking requiring compensation. *E.g.*, *Mahon*, 260 U.S. at 413; *see Penn Central*, 438 U.S. at 127. For example, in *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405 (1935), the Court invalidated a local regulation requiring a railroad to bear half the cost of separating railroad tracks from the level of the highway. It found the purpose of the requirement was merely to facilitate highway travel, and that it was unreasonable to impose such a cost on the railroad, a private party. *Id.* at 421-31.

With regard to the prong of analysis dealing with the degree of interference with the property, courts have applied a number of considerations, each developed under varying factual circumstances. At one time the concept of diminution of value was considered the dominant method of analysis. *See Sax, Takings, Private Property and Public Rights*, 81 Yale L.J. 149, 151 (1971). While it is clear that a diminution of value standing alone is not enough to establish a taking, *see, e.g., Penn Central*, 438 U.S. at 131, it has remained a viable part of the Court's "degree of interference" inquiry. *See Note, Regulation Without Just Compensation*, 69 Geo. L.J. 1083, 1105 (1981). Where there is no diminution in value, it is likely that there will be no taking. In *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), for example, the plaintiff—owner of a gravel pit whose right to excavate below the water table was prohibited—did not establish a taking because he failed to present evidence that the prohibition diminished the present value of the lot on which the pit was located. There is no set point at which a diminution in value is so great that a taking occurs. A diminution of 50% in the value of a chicken farm caused by low-flying government planes was sufficient to constitute a taking in *United States v. Causby*, 328 U.S. 256 (1946), while a 75% diminution in the value of a developer's land caused by a zoning change did not create a taking in

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Some commentators have suggested that the diminution of value concept is most useful when the challenged government action is more narrowly focused, as in *Causby*. *See Note, supra*, 69 Geo. L.J. at 1109. In any event, it seems clear that the extent of diminution is but "one fact for consideration" in determining whether governmental action constitutes a taking. *See Mahon*, 260 U.S. at 413. The Supreme Court has emphasized that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Penn Central*, 438 U.S. at 124; *Mahon*, 260 U.S. at 413.

Another element the courts have pointed to is the extent to which the regulation interferes with reasonable, distinct, investment-backed expectations. *Penn Central*, 438 U.S. at 124; *see Goldblatt*, 369 U.S. at 594. In *Penn Central* the Court focused on the impact of a city regulation, rejecting the proposition that a taking is established simply by showing the denial of "the ability to exploit a property interest that [the plaintiffs] heretofore had believed was available." 438 U.S. at 130. While the plaintiffs in that case were not permitted to use their ownership of air rights to build an office tower, the Court believed that other reasonable beneficial uses of the site remained. There was thus an insufficient interference with investment-backed expectations. *Id.* at 138.

Similarly, in *Andrus v. Allard*, 444 U.S. 51 (1979), the Court confronted a challenge to two federal statutes that prohibited the sale of portions of endangered birds, thereby preventing the sale, but not other uses, of artifacts containing eagle feathers. The Court rejected the takings claim, noting that the denial of one traditional property right does not always amount to a taking where alternative beneficial uses remain. *Id.* at 66.

C.

Appellants urge that we need not undertake an analysis applying the above principles relating to takings because this case is factually on all fours with *Mahon*. In *Mahon* the plaintiffs owned the surface of certain land in Pennsylvania on which their dwelling was located. The defendant, the Pennsylvania Coal Co., owned the coal underlying the land and had secured the right to remove that coal as well as a waiver of all claims from subsidence damage caused by the company's mining. 260 U.S. at 412. Relying on a state law known as the Kohler Act, the plaintiffs sought to enjoin the mining operations to the extent the mining would damage their home. The defense was that the Kohler Act was an unconstitutional violation of the takings clause. That Act, passed by the state legislature in 1921, forbade the mining of anthracite coal in such a way as to cause the subsidence of certain classes of buildings. It thus closely resembled parts of the Subsidence Act challenged in this appeal.

The similarity between the two acts suggests that the *Mahon* case may be particularly relevant to our inquiry. Nevertheless, for several reasons *Mahon* does not dispose of this appeal. The gravamen of the company's complaint in *Mahon* was that the Kohler Act merely protected the rights of a small group of private parties at the expense of other private parties, and was not legislation intended to promote a broad public interest pursuant to the police power, 260 U.S. at 394-404; see McGinley and Barrett, "Pennsylvania Coal Co. v. Mahon Revisited: Is the Federal Surface Mining Act a Valid Exercise of the Police Power or an Unconstitutional Taking?," 16 Tulsa L.J. 418, 430 (1981). Justice Holmes, writing for a majority of the Court, agreed with the company's characterization of the Act's purpose. He noted, in focusing on the nature of the government action, "This is the case of a single private house A source of damage to such a house is not a public nuisance even if similar damage is in-

flicted on others in different places. The damage is not common or public." 260 U.S. at 413. Furthermore, "the extent of the public interest [was] shown by the statute to be limited" since the Kohler Act did not "apply to land when the surface [was] owned by the owner of the coal." *Id.* at 414.

The Kohler Act was defended as legislation designed to protect personal safety, but the Court found the Act to be overbroad in this respect. *Id.*; see also McGinley and Barrett, *supra*, 16 Tulsa L.J. at 412. The goal of public safety could have been provided for by giving notice to homeowners of intended mining activities. The Court in this way distinguished *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), in which it had upheld legislation requiring pillars of coal to be left in the ground on the basis that those requirements were necessary "for the safety of employees." 260 U.S. at 415.

Not only was the Kohler Act found to lack substantial police power justifications, but it apparently rendered the removal of coal "commercially impracticable." *Id.* at 414; *Penn Central*, 438 U.S. at 1267; Note, *supra*, 69 Geo. L.J. at 1108. With so little evidence of justification for such a sweeping interference with the defendants' rights, see Comment, *Mine Subsidence Legislation in Pennsylvania and the Developing Concept of the Police Power*, 27 U. Pitts. L. Rev. 835, 850 (1966), the Court concluded the state law had "gone too far" and consequently was a taking.

In contrast, the Subsidence Act at issue here does seek to prevent common or public damage. The legislature found that the Subsidence Act was necessary to serve the public interest in preserving the land. Damage from mine subsidence was found seriously to have impeded land development throughout the Commonwealth and to have eroded the tax base of numerous municipalities. 52 Pa. Cons. Stat. Ann. § 1406.3. Moreover, unlike under the

Kohler Act, no surface owner is excluded from coverage, app. at 445, indicating that the Subsidence Act was intended to serve the public purpose of preserving surface estates and structures regardless of whether mine operators or other persons own them.

As the above legislative findings demonstrate, the Subsidence Act is designed to protect the environment of the Commonwealth, its economic future, and its well being. *Id.* While the Supreme Court stated in *Mahon* that notice might be adequate to promote the limited safety purposes of the Kohler Act, the legislature here found that such notice had not sufficed to promote the varied public concerns at issue. *Id.* Plaintiffs offer no evidence to show that this legislative determination was erroneous.

While we reject the suggestion that *Mahon* has been overruled *sub silentio*, see *Andrus*, 444 U.S. at 65-67; *Kaiser Aetna*, 444 U.S. at 174; *Penn Central*, 438 U.S. at 136-37, we conclude that because of the significant differences in the respective statutes' scopes and purposes, *Mahon* is not dispositive of the takings issue in this case.

D.

Because *Mahon* is distinguishable, we must proceed to apply the takings analysis to the situation present here. The cases suggest that there are three relevant fields of inquiry: first, whether the government's action entails a physical invasion of the plaintiff's property; second, the extent to which it results in a diminution in the value of plaintiff's property; and third, the degree to which it interferes with plaintiff's reasonable, distinct, investment-backed expectations. See, e.g., *Andrus*, 444 U.S. at 65-66; *Penn Central*, 438 U.S. at 124.

We first note that the legislation here does not authorize any actual physical invasion of the coal companies' property but rather regulates the manner in which the property may be used. Thus, the support require-

ments are more properly viewed as part of a public program adjusting the benefits and burdens of economic life to promote the common good and to prevent certain serious and identifiable harm to the general public. As previously observed, a government act of this character is less likely to be considered a taking. E.g., *Penn Central*, 438 U.S. at 124. The legislative purposes underlying the public program—protection of the environment, public safety, and economic welfare of the state—are classic grounds for the use of the police power.

The question of the degree of interference is complicated by the fact that the property in question is divided into multiple estates under state law. Pennsylvania property law recognizes surface, support, and mineral estates. See *Captline v. County of Allegheny*, 74 Pa. Super. 85, 459 A.2d 1298 (1983), *cert. denied*, 104 S. Ct. 1679 (1984). The support estate consists of the right to remove the strata of coal and earth that undergird the surface or to leave those layers intact to support the surface and prevent subsidence. These two uses cannot co-exist and, depending upon the purposes of the owner of the support estate, one use or the other must be chosen. If the owner is a mine operator, the support estate is used to exploit the mineral estate. When the right of support is held by the surface owner, its use is to support that surface and prevent subsidence. Thus, although Pennsylvania law does recognize the support estate as a "separat " property interest, *id.*, it cannot be used profitably by one who does not also possess either the mineral estate or the surface estate. See Montgomery, *The Development of the Right of Subjacent Support and the "Third Estate in Pennsylvania,"* 25 Temple L.Q. 1, 21 (1951).

To focus upon the support estate separately when assessing the diminution of the value of plaintiffs' property caused by the Subsidence Act therefore would serve little purpose. The support estate is more properly viewed as only one "strand" in the plaintiff's "bundle" of property

rights, which also includes the mineral estate. As the Court stated in *Andrus*, "[t]he destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." 444 U.S. at 65. The use to which the mine operators wish to put the support estate is forbidden. However, because the plaintiffs still possess valuable mineral rights that enable them profitably to mine coal, subject only to the Subsidence Act's requirement that they prevent subsidence, their entire "bundle" of property rights has not been destroyed. That the statute and regulations challenged prevent the most profitable use of their property is not in itself dispositive. *Id.*; *Central Eureka Mining Co.*, 357 U.S. at 168. This case thus does not present the situation confronted by the Court in *Mahon*, in which it was found that the Kohler Act prevented the mining companies from profitably exercising their right to mine coal.⁶ 260 U.S. at 414-15.

⁶ Plaintiffs point out that in *Mahon* the Court stated that "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." 260 U.S. at 414 (emphasis added). At first blush, this language seems to suggest that the Court would have found a taking no matter how little of the defendants' coal was rendered unmineable—that because "certain" coal was no longer accessible, there had been a taking of that coal. However, when one reads the sentence in context, it becomes clear that the Court's concern was with whether the defendants' "right to mine coal . . . [could] be exercised *with profit*." 260 U.S. at 414 (emphasis added). Indeed, in the paragraph following the language at issue, the Court distinguished *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), in which a requirement that pillars of coal be left in the ground as a safety measure was held not to be a taking. Certainly, in that case, the challenged statute made it commercially impracticable to mine "certain" coal. Yet, in light of the important public purpose served by the Act and the fact that "it require[d] a comparatively small portion of the valuable contents of the vein to be left in place," 232 U.S. at 540, the Court found in *Plymouth* that no taking had occurred. Thus, the Court's holding in *Mahon* must be assumed to have been based on its understanding that the Kohler Act rendered the business of mining coal unprofitable. Plaintiffs do not contend that this is the case here.

With respect to interference with reasonable investment-backed expectations, the support requirements do not appear to work so substantial an interference as to result in a taking. In *Penn Central*, the Court applied this test to the divided property context. It read *Mahon* as stating that a statute may "frustrate distinct investment-backed expectations" when it has "nearly the same effect as the complete destruction of rights [a party] had reserved from the owners of the surface land." *Penn Central*, 438 U.S. at 127. The Court thus stressed that the coal owners in *Mahon* had expressly contracted with individual surface owners for the waiver of any claim for damages due to subsidence. It was reasonable for them to have distinct expectations, grounded upon those waivers, to be free to mine coal without liability for damage caused to the surface owners' estates. The Kohler Act thwarted those expectations by shifting the burden contractually imposed upon the surface owners to the mine operators. In so doing the Act appeared only to affect private interests.

In the present appeal, however, the statute at issue is clearly designed to serve broad and legitimate public interests. The ownership of the support estate does not afford a mine operator a reasonable expectation to profit at the expense of the public at large, but only at the expense of the surface owner with whom it contracted. Likewise, ownership of the surface estate does not give a landowner the right to waive away rights of support if the legislature deems them necessary for the public good. Just as coal mining activities may be restricted when they intrude upon the interests of adjacent owners, or the holders of water rights, police power may be invoked to protect the public. Thus, a property owner's reasonable expectations as to the possible uses of his property are always circumscribed by the limitations on its use that may be imposed by the state in the public interest. "A prohibition simply upon the use of property for pur-

poses that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Goldblatt*, 369 U.S. at 593 (quoting *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887)). The support requirements thus cannot be said to interfere with reasonable investment-backed expectations.

In light of the character of the governmental action and the degree of interference present, we cannot say that the district court erred in concluding that sections 4 and 5 do not violate the takings clause.

III

Section 6 of the Act provides that if "the removal of coal or other mining operations . . . causes damage to structures set forth in section 4" the operator must "submit evidence that such damage has been repaired or that all claims arising therefrom have been satisfied" 52 Pa. Cons. Stat. Ann. § 1406.6. This duty is apparently imposed even though a mine operator has left coal in place beneath that structure or holds a release or waiver of damage from the surface owner.

Plaintiffs argue that this provision violates the contract clause of the Constitution. We believe that the district court properly rejected this claim. Two levels of scrutiny are employed to evaluate challenges under the contract clause: one applies when economic or social legislation affects a wholly private contract, and the other when the state itself is a party to the contract. See *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400 (1983). Under either level of scrutiny, the threshold inquiry is whether the state law has substantially impaired a contractual relationship. See, e.g., *Allied*

⁷ Plaintiff's assertion that section 6 constitutes a taking is rejected for the reasons set forth in Section II, *supra*.

Structural Steel Co. v. Spanraus, 438 U.S. 234, 244 (1978). If the state regulation does constitute a substantial impairment, the second step is to determine whether there is a significant and legitimate public purpose behind the regulation, such as the remedying of broad and general social or economic problems. E.g., *Troy Ltd. v. Renna*, 727 F.2d 287, 297 (3d Cir. 1984); see also *Energy Reserve*, 459 U.S. at 411. Once a legitimate public purpose has been identified, the court must address whether the adjustment of the parties' rights and responsibilities is based upon reasonable conditions and is of a character appropriate to the legislature's public purpose. E.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

It is at this third stage that the analysis shifts for contracts involving the government. Unless the state itself is a contracting party the courts should defer to the legislative judgment as to the reasonableness of the particular measure, as is customary in reviewing economic and social regulations in other contexts. See *United States Trust*, 431 U.S. at 22-23. If the state is a party, however, the court may inquire whether a less drastic modification would be sufficient and whether the legislation remained reasonable in light of changed circumstances. *Id.* at 30-32; see also *Troy*, 727 F.2d at 296.

The district court held, and the parties agree, that although section 6 does operate as a substantial impairment of contractual relationships, the state has shown that the regulation serves a legitimate public purpose. With regard to the contracts between private parties, however, the plaintiffs assert that the district court did not exercise sufficient scrutiny at the third step of the test, i.e., whether the legislation was based upon reasonable conditions and of a character appropriate to the public purposes behind the Act. We disagree. The legislature expressly found that subsidence damage devastated many surface structures and thus endangered the health,

safety, and economic welfare of the Commonwealth and its people. The legislature concluded, not without basis, that property owners who received damage awards would repair their property, thus preserving the state's limited tax base and land available for development. In the alternative, the operator might repair the damage, accomplishing the same end. As we noted in *Troy*, in "assessing the reasonableness of these purposes, we are admonished not to substitute our views for those of the legislature. Because the state is not itself a contracting party, in this sphere of economic and social regulation we 'properly refer to legislative judgment as to the necessity and reasonableness of the Act.'" 727 F.2d at 298 (quoting *Energy Reserves*, 459 U.S. at 413). The district court did not err in rejecting this contract claim.⁸

⁸ The companies also argue on appeal that the legislation affects contracts to which the state is a party, so that more exacting scrutiny is necessary. The district court, however, clearly stated that plaintiffs did "not allege that the legislation and DER regulations under attack impair any contract to which the Commonwealth is a party." App. at 442. Appellants have not challenged this finding. Rather, they seem to argue that, because the term "public buildings" in section 4 encompasses state-owned buildings, there must be contracts in which the state waived its claims for damage caused by subsidence. Where the existence of such contracts was not alleged at trial, however, assertions of their impairment will not be addressed on appeal. Thus the district court applied the correct standard of review.

It is true that some "public buildings" may not be on the tax rolls. If preservation of the tax rolls were the only legitimate public purpose of the Subsidence Act, the protection of nontaxable structures might fail to meet the requirement that the conditions of governmental interference with contracts be appropriate to the legislature's purpose. However, the legislative findings clearly indicate that other legitimate public purposes were offered as justifications for the act. The state intended to preserve land for future development in order to protect the "economic future" of the Commonwealth. In light of this we cannot say that the legislature was unreasonable in providing for the preservation of all the structures listed in section 4, and the land supporting them. Cf. *Troy*, 727 F.2d at 298.

IV.

Section 89.147(b) of the DER regulations provides:

When underground coal mining activities reduce the value or the reasonably foreseeable uses of surface land, the operator shall restore the land to the extent technologically and economically feasible to its pre-mining condition.

25 Pa. Admin. Code § 89.147(b). Plaintiffs urge that this section violates the contract clause by imposing upon them the obligation to restore the surface estate even in situations in which they have contracted for the right to remove all coal, including support coal.

The companies concede that the public has a legitimate interest in the restoration of land damaged by subsidence, but argue that § 89.147 is not reasonably tied to that permissible interest. They also acknowledge that the provision "actually furthers, in some sense, a public purpose." Brief for Appellants at 47. Still, they insist that the imposition of a duty to restore land where the damage was unavoidable and nonnegligent and the surface owner has waived his right to damages is unjustifiable. The legislative findings that the restoration of damaged land is central to the future economic well-being of the Commonwealth is entitled to substantial deference. See *Energy Reserves*, 459 U.S. at 412-13. Especially in light of the fact that § 89.147 does not impose an absolute obligation, but is conditioned on both economic and technological feasibility, we cannot say that the district court erred in concluding that the restoration requirements are reasonable conditions of a character appropriate to the public purposes. See *Troy*, 727 F.2d at 297-98.

V.

The mine operators finally allege that section 15 of the Subsidence Act is an invalid exercise of the power of eminent domain because it serves no "public use." That

portion of the statute permits the owners of structures not otherwise protected by the Act to purchase, for "just compensation," the "amount of the coal necessary to be left in place for surface support." 52 Pa. Cons. Stat. Ann. § 1406.15.

Our disposition of this issue is guided primarily by the Supreme Court's recent decision in *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984), which was handed down after the district court's ruling in this case. *Midkiff* dealt with a challenge to a state law that created a land condemnation arrangement whereby title in real property was taken from lessors and transferred to lessees in order to reduce the social and economic evils of a land oligopoly traceable to the early high chiefs of the Hawaiian Islands. The landowners claimed that the statute violated the Constitution's public use clause. U.S. Const. amend. V ("private property [shall not] be taken for public use, without just compensation").

The Court explained that the "public use" requirement of the Constitution is coterminous with the scope of a sovereign's police powers. Thus, in reviewing a legislature's judgment of what constitutes a public use, the scope of review by the courts is "an extremely narrow one." 104 S. Ct. at 2329 (quoting *Berman v. Parker*, 348 U.S. 26 (1954)). Courts are not to substitute their judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation." *Id.* (quoting *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668, 680 (1896)). Under that standard of review the Supreme Court had "no trouble concluding that the Hawaii Act is constitutional." 104 S. Ct. at 2330.

In the present appeal the mine operators recognize the obstacle that *Midkiff* places in their path. Nevertheless they press their claim, arguing that an important distinction, and the fatal flaw of section 15, is that there is no requirement in the Act that the surface owner demonstrate that the coal being purchased at a just price is

absolutely necessary to avoid subsidence damage. We find no merit in this argument. In *Midkiff* the Court refused to "second guess" the legislature's *presumption* that because a number of persons had declared they were willing but unable to buy lots at fair prices the land market was malfunctioning. *Id.* Similarly, we are unwilling to find wholly irrational the Pennsylvania legislature's presumption that only those surface owners that needed coal for support of the surface would avail themselves of the right to purchase such support coal.⁹ Under *Midkiff* the question is not whether the state plan is perfect, or the best possible scheme, or even likely to achieve its intended goals. The constitutional requirement is satisfied if the state legislature rationally could have believed that the Act would promote its objective. *Id.*; see also *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 671-72 (1981). We cannot say the legislature's conclusion was irrational.

VI.

The Commonwealth has plenary power to engage in regulation that adjusts economic benefits and burdens for the common good. See, e.g., *Penn Central*, 438 U.S. at 124-25; *Hadacheck*, 239 U.S. at 410. We conclude that in this case the Commonwealth has exercised that power without breaching constitutional boundaries. For the foregoing reasons, the district court's grant of summary judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

⁹ The Commonwealth concedes that in any event the coal company may, should it believe the purchase was not related to support needs, test the request in court.

24a

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-3406

KEYSTONE BITUMINOUS COAL ASSN., a Pennsylvania unincorporated association of bituminous coal producers, individually and as represented by certain of its member companies; HELVETIA COAL COMPANY, a Pennsylvania corporation; ROCHESTER & PITTSBURGH COAL COMPANY, a Pennsylvania corporation; U.S. STEEL MINING Co., INC., a Delaware corporation, individually and as a trustee *ad litem* for KEYSTONE BITUMINOUS COAL ASSN.; UNITED STATES STEEL CORPORATION, a Delaware corporation; and CONSOLIDATION COAL COMPANY, a Delaware corporation,

Appellants

v.

PETER S. DUNCAN, indiv. and in his capacity as Secretary of the Commonwealth of Penna. Dept. of Environmental Resources, PHILIP ZULLO, indiv. and in his capacity as Chief, Div. of Mine Subsidence of the Bureau of Mining and Reclamation of the Comm. of Penna., Dept. of Environmental Resources, and THOMAS B. ALEXANDER, indiv. and in his capacity as Chief, Section of Mine Subsidence Regulation of the Div. of Mine Subsidence of the Bureau of Mining and Reclamation of the Comm. of Penna., Dept. of Environmental Resources.

25a

On Appeal from the United States District Court
for the Western District of Pennsylvania

(C. A. No. 82-2712)

Present: ADAMS, WEIS and WISDOM,* *Circuit*
Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel February 27, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered February 29, 1984, and certified to this Court pursuant to 28 U.S.C. § 1292(b), be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ Sally [Illegible]
Clerk

August 26, 1985

* Hon. John Minor Wisdom, U.S. Court of Appeals for the Fifth Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, HELVETIA
COAL COMPANY, ROCHESTER AND PITTSBURGH COAL
COMPANY, U. S. STEEL MINING COMPANY, INC., UNITED
STATES STEEL CORPORATION and CONSOLIDATION COAL
COMPANY,

vs.

*Plaintiffs,*NICHOLAS DEBENEDICTIS, PHILIP ZULLO and THOMAS B.
ALEXANDER,*Defendants.*

OPINION

Ziegler, District Judge

More than 60 years have passed since the Supreme Court announced its landmark decision in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). Speaking for the majority, Justice Holmes explained that the police power of government has a limit and action beyond that limit results in a "taking" of private property for which just compensation is required. The Court declared unconstitutional a Pennsylvania statute that prohibited coal mining that caused subsidence damage to surface lands.

In this case we are faced with a constitutional challenge to another Pennsylvania statute which seeks to prevent coal mining subsidence damage. However, the

statute here differs from the enactment in *Pennsylvania Coal*; the parties are different; and, most importantly, the passage of time and subsequent decisions require that *Pennsylvania Coal* be placed in proper perspective.

In the present case, defendants, who are state officials charged with enforcing the act, maintain that the statute is a valid exercise of Pennsylvania's inherent police power to regulate private industry for the public health, safety and welfare. Plaintiffs argue that the statute goes beyond police power and appropriates private property for public use in violation of the Takings Clause of the Fourteenth Amendment. Thus we are presented with a classic confrontation between private property interests and public powers of regulation since the opposing interests are well-defined and nearly perfectly equal in magnitude.

Because plaintiffs have not alleged any injury due to the enforcement of the statute, there is as yet no concrete controversy regarding the application of the specific provisions and regulations. Thus, the only question before this court is whether the mere enactment of the statute and regulations constitutes a taking. *Agins v. City of Tiburon*, 447 U.S. 255 (1980). For the reasons that follow, we hold that the Pennsylvania legislation and regulations do not exceed the inherent police power of the state and defined by *Pennsylvania Coal* and its progeny. Plaintiffs' motion for summary judgment must be denied and defendants' motion for judgment must be granted.

I. *History of Case*

Five coal companies and an association representing similar interests instituted this civil action challenging the constitutionality of three sections of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, 52 P.S.A. § 1406.1 *et seq.*, and three regulations of the Pennsylvania Department of Environmental Re-

sources (DER) adopted under the act. Plaintiffs seek an injunction to prevent enforcement of these provisions by the DER officials.

The challenged provisions are as follows:

(1) Section 1406.4, which prohibits mining that causes subsidence damage to certain surface structures in place as of April 27, 1966, namely, any publicly-used building, residential building or cemetery.

(2) Section 1406.6, which gives the DER authority to revoke a mining permit if a company fails to pay a reasonable sum to repair subsidence damage to the structures listed in § 1406.6.

(3) Section 1406.15, which allows the owner of a structure not listed in § 1406.4 to pay a reasonable price to purchase from the coal company the underlying coal that supports the structure. This section provides for arbitration or mediation if the parties fail to agree upon a reasonable price.

(4) DER Regulation 89.145, which expands the protected structures of § 1406.4 to include: perennial streams and large impoundments of water, aquifers that serve as a significant source of public water supply, and coal refuse disposal areas. This regulation also prohibits mining under urban areas.

(5) DER Regulation 89.146, which requires coal operators to leave 50 percent of their coal in place for support under structures and features protected under § 1406.4 and DER Regulation 89.145.

(6) DER Regulation 89.147(b), which provides that, when underground mining activities reduce the value or foreseeable uses of surface land, the operator shall restore the land to its premining condition.

Plaintiffs contend that § 1406.4 and DER Regulations 89.145 and 89.146 violate (a) the Due Process Clause

of the Fourteenth Amendment in that property is taken without just compensation and (b) the Contract Clause of the United States Constitution, Article I, Section 10, in that the regulations destroy private contract rights. Plaintiffs also argue that § 1406.6 and DER Regulation 89.147(b) impair private contracts in contravention of the Contract Clause. Finally, plaintiffs urge that § 1406.15 is an unconstitutional exercise of the power of eminent domain because the taking is without a public purpose.

II. The Contract Clause

Article I, Section 10 of the Constitution provides that: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ." Although the language of the Contract Clause appears to be absolute, its prohibition must accommodate the inherent police power of a state "to safeguard the vital interests of its people." *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 434 (1934); *Energy Reserves Group v. Kansas Power & Light*, — U.S. —, 103 S.Ct. 697 (1983). Any regulation promulgated by a state under its legitimate police powers does not violate the Contract Clause if the enactment serves a legitimate public purpose and does not simply provide a benefit to special interests. *Energy Reserves Group*, 103 S.Ct. at 705.

Courts generally will defer to a legislative determination of public purpose in testing legislation under the Contract Clause, except when the state enacts legislation to avoid its contractual obligations. Thus, when the state is a party to a contract, the Contract Clause is given a more absolute, literal meaning because "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *United States Trust Company v. New Jersey*, 431 U.S. 1, 26 (1977). Where the state is not a contracting party, "[a]s is customary in review-

ing economic and social regulation, . . . concurs properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Energy Reserves Group*, 103 S.Ct. at 705-06.

Justice Blackmun, speaking for a unanimous Court in *Energy Reserves Group*, wrote that economic and social legislation is to be analyzed under the Contract Clause through a three-step test. 103 S.Ct. at 704-05. That test was recently applied by the Court of Appeals in *Troy, Ltd. v. Renna*, Nos. 83-5077 and 83-5097 (3d Cir. Jan. 30, 1984), as Judge Gibbons explained:

The threshold inquiry is whether the state law has operated 'as a substantial impairment of a contractual relationship ' If the state law is found to be a substantial impairment, then a second inquiry is required: 'the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem. . . . ' Finally, if such a legitimate public purpose is identified, a third query is posed: the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purposes justifying the legislation's adoption.

Slip op. at 21.

Plaintiffs do not allege that the legislation and DER regulations under attack impair any contract to which the Commonwealth is a party. Therefore, we need only apply a lower level of scrutiny under the Contract Clause using the three-step test.

It is not disputed that plaintiffs have established the threshold requirement that the laws in question operate to substantially impair a contractual relationship. The

parties have stipulated that landowners in Western Pennsylvania have conveyed title to the coal and the right of surface support to plaintiffs, while retaining ownership of the surface estate, and that approximately 90 percent of the coal now being mined and to be mined by plaintiffs was purchased by severing the coal and support estates from the surface estates.¹ It is clear that the owners of the surface estates or their predecessors in title contracted away their right to support of the surface and that the legislation and regulations in question seek to guarantee support of the surface despite these contractual relationships. We find that plaintiffs have satisfied the first prong of the test of *Energy Reserves Group*.

We next find that the Commonwealth has a significant and legitimate public purpose behind the regulations. In applying this factor, we must give deference to the public purpose expressed by the legislature. The General Assembly of Pennsylvania has made extensive legislative findings to support a legitimate public purpose. The legislature determined that the Bituminous Mine Subsidence and Land Conservation Act was necessary because mine subsidence impedes land development, erodes the tax base of affected municipalities and causes "a very clear and present danger to the health, safety and welfare of the people of Pennsylvania." See 52 P.S.A. § 1406.3 (Purdon's 1983).

Finally, we find that the legislation and regulations in question, which adjust the rights and responsibilities of the contracting parties, are reasonably related to the public purpose to be served. The General Assembly has identified important state interests in preserving the integrity of surface structures and features. Its interest is

¹ Pennsylvania recognizes three types of estates in land—the surface, the coal and the right of support—and each of these may be vested in different persons at the same time. *Smith v. Glen Alden Coal Company*, 347 Pa. 290, 32 A.2d 227 (1943).

to prevent subsidence damage, not to provide remedies after damage has been incurred. The legislation and regulations specify only those surface structures and features in which the Commonwealth has a legitimate interest. Thus, the act and the regulations promulgated under it are tailored to serve the expressed public purpose of the legislature.

Applying the teachings of *Energy Reserves Group*, we conclude that the incidental adjustment of the private contractual relationships at bar do not render the legislation unconstitutional under the Contract Clause. We further hold that §§ 1406.4 and 1406.6 and DER Regulations 89.145, 89.146 and 89.147(b) are not unconstitutional under the Contract Clause.

III. Police Power and Takings

Plaintiffs next argue that § 1406.4 and DER Regulations 89.145 and 89.146 constitute a taking of property without just compensation in violation of the Due Process Clause of the Fourteenth Amendment. Plaintiffs maintain that the legislation and regulations destroy an estate in land, that is, the support estate which they purchased and severed from the surface estate. Because Pennsylvania recognizes the support estate as a separate estate in land, according to plaintiffs, any regulation that requires coal mine owners to maintain support estates to prevent subsidence damage to the surface estate represents an uncompensated "taking" of the support estate. To buttress this argument, plaintiffs cite *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

A. The Pennsylvania Coal Company Case

In 1921, the Pennsylvania General Assembly enacted Act 445, P.L. 1198, commonly referred to as the Kohler Act, declaring unlawful the mining of anthracite coal that caused subsidence damage to any public building, passageway, public utility, residential structure or ceme-

tery. The Mahons owned the surface land on which their residence was located, and Pennsylvania Coal Company owned the coal underlying the surface estate. The Mahons' predecessor in title purchased the surface estate from Pennsylvania Coal, which reserved to itself the mineral and support estates to the property. The Mahons, trying to prevent the cave-in and collapse of their house, sought enforcement of the Kohler Act to stop Pennsylvania Coal from mining under their property. The company argued that the Kohler Act was unconstitutional because it protected the rights of a small group of private parties, rather than the public interest.

The Supreme Court agreed. Justice Holmes, writing for the majority, explained that regulation may go so far as to constitute a "taking" of private property for which just compensation is required. Justice Brandeis, in a much-quoted dissent, concluded that a restriction imposed to protect the public health, safety or morals from threatened dangers is not a taking.

Because the instant case is factually similar to *Pennsylvania Coal*, our fidelity to the common law tradition requires that we ascertain its true holding. To do so, we must examine the Kohler Act and its perceived deficiencies. Justice Holmes criticized three aspects of the law: (a) it was not justified as a protection of public safety; (b) it was not directed to preventing common or public damage; and (c) it did not apply to all surface owners because any coal companies, owning the surface estate as well as the mineral and support estates, were exempted from the act.

The Bituminous Mine Subsidence and Land Conservation Act overcomes all three criticisms; it is justified as a public safety measure;² it seeks to prevent common or

² The public purpose is contained in § 1406.3 of the act:

It is hereby determined by the General Assembly of Pennsylvania and declared as a matter of legislative findings that:

(1) Present mine subsidence legislation and coal mining laws have failed to protect the public interest in Pennsylvania in preserving our land.

(2) Damage from mine subsidence has seriously impeded land development of the Commonwealth.

(3) Damage from mine subsidence has caused a very clear and present danger to the health, safety and welfare of the people of Pennsylvania.

(4) Damage by subsidence erodes the tax base of the affected municipalities.

(5) Coal and related industries and their continued operation are important to the economic welfare and growth of the Commonwealth.

(6) In the past, owners of surface structures have not in many instances received adequate notice or knowledge regarding subsurface support, or lack thereof, for surface structures, and therefore the State must exercise its police powers for the protection of the structures covered herein.

(7) In order to prevent the occurrence of such state of affairs in the future, the deed notice provisions relating to such subsurface support, or lack thereof to a person desiring to erect a surface structure after the effective date of this act, must be emphasized and strengthened and it is necessary to make available to those persons desiring to erect a surface structure procedures whereby adequate support of such structure can be acquired.

The Pennsylvania General Assembly therefore declares it to be the policy of the Commonwealth of Pennsylvania that:

(1) The protection of surface structures and better land utilization are of utmost importance to Pennsylvania.

(2) Damage to surface structures and the land supporting them caused by mine subsidence is against the public interest and may adversely affect the health, safety and welfare of our citizens.

(3) The prevention of damage from mine subsidence is recognized as being related to the economic future and well-being of Pennsylvania.

(4) The preservation within the Commonwealth of surface structures and the land supporting them is necessary for the safety and welfare of the people.

(5) It is the intent of this act to harmonize the protection of surface structures and the land supporting them and the continued

public damage;³ and no surface estate owner is excluded from the act.

It is also worth noting that much of the opinion in *Pennsylvania Coal* is cast in terms of government's power to enact legislation affecting private affairs. But Justice Holmes narrowed the holding when he wrote: "This is the case of a single private house. . . . [U]sually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public." 260 U.S. at 413. Clearly, the case did not involve the interests of the coal industry in underground mining against a generally broad public interest in the integrity of surface structures and features. Indeed, Holmes's opinion can be closely tied to *Pennsylvania Coal's* argument that the "Kohler Act is not directed to the safety of the public, but is for the benefit solely of a particular class." 260 U.S. at 399.⁴

growth and development of the bituminous coal industry in the Commonwealth.

(6) It is necessary to provide for the protection of those presently existing structures which are or may be damaged due to mine subsidence.

(7) It is necessary to provide a method whereby surface structures erected after the effective date of this act may be protected from damage arising from mine subsidence.

³ See 52 P.S.A. § 1406.2, which states the purpose of the act.

⁴ See also McGinley, Barrett, *Pennsylvania Coal Company v. Machon Revisited*, 16 Tulsa L.J. 418, 451-52 (1981):

Pennsylvania Coal was not a case in which legislation was enacted to serve an important public interest. Rather, the statute struck down by the Court was directed at protecting private interests. . . . The fifth amendment was never intended to recognize or to secure vested property rights in those whose private activities harm important public interests. (Emphasis added.)

In the instant case, this court is called upon to determine the constitutionality of a statute whose expressed purpose is to protect the public health, safety and welfare. Therefore, *Pennsylvania Coal* is distinguishable and we must canvass the decisions of the Supreme Court concerning police power and "takings" for guidance.

B. Police Power and Takings

One precept from *Pennsylvania Coal* that retains as much vitality today as it did in 1922 is that, while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. Unfortunately, the Supreme Court has not drawn a bright line between police power and taking. As the Court stated in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124 (1978):

[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

As a result, the question whether a particular governmental restriction amounts to a constitutional taking turns upon the particular circumstances of each case. *United States v. Central Eureka Mining Company*, 357 U.S. 155 (1958). In the absence of a "set formula," taking questions must be answered by analogizing Fourteenth Amendment decisions. To aid in the present case, we will consider four recent Supreme Court decisions.

In *Penn Central Transportation Company, supra*, the owner of an historic structure challenged as a taking a landmark's preservation law which prohibited exterior alterations of the building. The Court held that such a regulation was not a taking, although the regulation significantly impaired investment-backed expectations. The

regulation was upheld because it was reasonably related to the promotion of the general welfare. In *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982), a New York statute provided that a landlord must permit a cable television company to install cable facilities on his property and may not demand payment from the company in excess of \$1. The Court found a taking and held that the permanent physical occupation of real property is a taking, without regard to whether the occupation achieves an important public benefit. In *Andrus v. Allard*, 444 U.S. 51 (1979), an owner of bald eagle parts challenged as a taking a federal law forbidding the sale of such parts. The Court concluded that the law did not amount to a taking because the owner retained some rights in the property—the right to possess and transport the parts. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the owner of a lagoon in Hawaii converted the pond to a marina by connecting it to the bay. The federal government claimed that the lagoon then became subject to a "navigational servitude" because it became part of the navigational waterways. The Court found a taking because the servitude resulted in a physical invasion of the privately owned marina. The government, therefore, was required to pay just compensation.

A careful reading of these holdings reveals the following rules governing takings: (1) any permanent physical occupation of the land by the government constitutes a taking, *Loretto, supra* at 427; (2) if the government creates an easement for public use in private property, there is a physical invasion and a taking, *Kaiser Aetna, supra* at 180; (3) land-use regulations that destroy or adversely affect recognized real property interests can be upheld if the state legislature reasonably concludes that the health, safety, morals or general welfare would be promoted by prohibiting contemplated uses of land, *Penn Central Transportation Company, supra* at 125, and (4) for a

land-use regulation to constitute a taking, where no physical invasion by the government is present, the regulation must destroy the owner's entire "bundle" of property rights, *Andrus, supra* at 66.⁵

Applying these rules, we conclude that the Bituminous Mine Subsidence and Land Conservation Act does not

⁵ Several commentators have advanced differing theories on when a government regulation exceeds police power authority and results in a taking. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 62-63 (1964):

This analysis rests upon the distinction between the role of government as participant and the government as mediator in the process of competition among economic claims. The losses to individual property owners arising from government activity of the first type result in a benefit to a government enterprise; losses arising from the second type of activity are the result of government mediating conflicts between competing private economic claims and produces no benefit to any government enterprise

The rule proposed here is that when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the public power.

In Dunham, *A Legal and Economic Basis for City Planning*, 58 Colum. L. Rev. 650 (1958), the author discusses taking in terms of the government's motive in enacting the land-use restriction. If the restriction is intended to prevent harmful conduct of a property owner, government is acting within its police power. However, if government is attempting to usurp a benefit by its use of private property, there is a taking for which just compensation is required. And in Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967), the writer criticizes the tests proposed by Sax and Dunham, finding no meaningful distinction between a regulation that seeks to prevent harm and one that results in an economic benefit to the government. Michelman suggests that a need for compensation arises when property is capriciously redistributed and the regulation operates in an unfair and discriminatory fashion.

constitute a taking and is a legitimate exercise of the Commonwealth's police power. First, the statute and DER regulations do not result in a permanent, or even temporary, physical occupation of plaintiffs' real property. Plaintiffs retain title and possession of the mineral and support estates. The restrictions merely deal with plaintiffs' use of their properties to prevent harm to the public generally. Second, the statute and regulations do not vest in the public generally any right to an easement or other servitude in the mineral or support estates. And third, the restrictions can be upheld on the basis that the Commonwealth has determined that the health, safety and general welfare of the public are promoted by restricting such uses of land.

C. *The Support Estate*

Plaintiffs' final argument, that is, the restrictions constitute a taking because they destroy a recognized property right in Pennsylvania—the support estate, must be considered. Here we again turn to *Andrus v. Allard*, 444 U.S. at 66. The Court declared:

[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking.

In *Andrus*, the Eagle Protection Act destroyed the most profitable "strand" of property rights, the right to sell bald eagle parts. However, the entire "bundle" of rights was not destroyed because the appellees could continue to possess, transport and publicly display their property. In

the present case, plaintiffs argue that the legislation and regulations entirely destroy their support estate. Implicit in this argument is the assumption that the support estate "bundle" of rights consists of only "strand"—the right to cause subsidence damage to the surface estate. State law must be consulted therefore to determine whether the support estate "bundle" contains any other "strands."

Property interests are created by state law. A plaintiff claiming a due process violation, "while relying upon state law to establish his property right, looks to federal law to define procedural due process." *Pedersen v. South Williamsport Area School District*, 677 F.2d 312, 316 (3d Cir. 1982), cert. denied, — U.S. —, 103 S. Ct. 305 (1982). See also *Perri v. Aytch*, No. 83-1072 (3d Cir., Dec. 22, 1983). Pennsylvania law clearly establishes that the support estate consists of more than simply the right to cause subsidence damage to the surface estate. By waiving a mineral estate owner's liability, a surface estate owner grants to the coal operator the right to gain access to the coal. The coal operator is thereby held harmless for any non-negligent damage to the surface estate when exercising the right to extract coal. Further, the owner of mineral and support estates has the privilege to dig shafts for access and ventilation without threat of suit from the surface estate owner, *Chartiers Block Coal Company v. Mellon*, 152 Pa. 286, 25 A.59 (1893); *Westerman v. Pennsylvania Salt Manufacturing Company*, 260 Pa. 140, 103 A.539 (1918); and the right to disturb underground wells that feed the surface estate. *Hughes v. Emerald Mines*, 303 Pa. Super. 426, 540 A.2d 1 (1982).

The legislation and regulations, restricting only the surface subsidence effects of coal mining, do not destroy these other "strands" of the support estate. Thus, because there is no physical invasion of the land by the Commonwealth and because the restrictions do not destroy plaintiffs' entire "bundle" of rights in the support estate, we

conclude that Section 1406.4 and DER Regulations 89.145 and 89.146 do not constitute a taking.⁶

IV. Eminent Domain and Public Purpose

Finally, plaintiffs argue that § 1406.15 is an unconstitutional use of the eminent domain power because it forces coal owners to sell coal to private owners to guarantee support of their surface estate. Although coal owners receive just compensation for such a sale, plaintiffs

⁶ The support estate recognized in Pennsylvania is a nebulous concept. Whereas the surface and mineral estates represent tangible real property, the support estate is more akin to a covenant running with the land. In Montgomery, *The Development of the Right of Subjacent Support and the "Third Estate" in Pennsylvania*, 25 Temple L.Q. 1, 17 (1951), the author states:

The right of subjacent support is a 'natural' or proprietary right inhering in the ownership of the surface. It has been called a natural easement; that is, an easement arising, not out of a grant, but from natural rights as conceived by the common law. The right of the owner of such natural right or easement to dispose of the same by appropriate deed or grant is well-settled.

Montgomery suggests that the right of support is more like a covenant running with the land rather than a separate estate in land because the holder of only a support estate has nothing of value unless he owns either the surface estate or the mineral estate. The only possible value he envisions is nuisance value in keeping title of the support estate away from those who want it—the owners of the surface and mineral estates.

In Casper, *Police Power and the Third Estate*, 53 Dickinson L. Rev. 277 (1949), the author suggests that the state has power to regulate undesirable uses of the support estate as it has to regulate undesirable uses of the surface and mineral estates. Because the constitutionality of land-use regulations is founded on the common law doctrine of nuisance, and the right of an owner to do as he wishes with his land is limited by the prevention of a use that injures a neighbor's property, the author argues, there should be no constitutional prohibition against prohibiting a harmful use of the subsurface as well as the surface.

maintain that the forced sale is an eminent domain taking that lacks the required public purpose.

When reviewing eminent domain proceedings to determine whether a public purpose is served, a court must give deference to legislative findings of public purpose, *Berman v. Parker*, 348 U.S. 26 (1954), and not substitute the landowner's standard of the public need for the standard prescribed by the legislature. Measuring the public need is an act within the discretion of the legislative branch. *Berman v. Parker*, *supra*.

The public need for § 1406.15 has been described by the Pennsylvania General Assembly in § 1406.3(7), which provides that owners of surface structures erected after the effective date of the act must be afforded protection from subsidence damage and that such protection will further other stated purposes of the act, including prevention of damage to the health, safety and welfare of the people of Pennsylvania. This court defers to the legislature's determination of public purpose and, therefore, we hold that § 1406.15 is a constitutional use of the state's power of eminent domain.

Finding no constitutional infirmity, plaintiffs' motion for summary judgment must be denied. Although defendants have moved only for partial summary judgment, we find an absence of any genuine issue of material fact, and therefore judgment will be entered for defendants on all claims of plaintiffs.

A written order will follow.

/s/ Donald E. Ziegler
DONALD E. ZIEGLER
United States District Judge

DATED: February 29, 1984

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, HELVETIA
COAL COMPANY, ROCHESTER AND PITTSBURGH COAL
COMPANY, U.S. STEEL MINING COMPANY, INC., UNITED
STATES STEEL CORPORATION and CONSOLIDATED COAL
COMPANY,

Plaintiffs,

vs.

NICHOLAS DEBENEDICTIS, PHILIP ZULLO
and THOMAS B. ALEXANDER,

Defendants.

ORDER OF COURT

AND NOW, this 29th day of February, 1984

IT IS ORDERED that the motion of plaintiffs for summary judgment be and hereby is denied.

IT IS FURTHER ORDERED that the motion of defendants for partial summary judgment shall be treated as a motion for summary judgment as to all issues because the parties have addressed all issues in their briefs and, as we have noted, there are no genuine issues of material fact.

IT IS FURTHER ORDERED that the motion of defendants for summary judgment be and hereby is granted.

/s/ Donald E. Ziegler
DONALD E. ZIEGLER
United States District Judge

cc: Thomas Reed, Esq.
Henry McC. Ingram, Esq.
Douglas A. Blazey, Esq.
Robert B. Hoffman, Esq.
David Onuscheck, Esq.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, HELVETIA
COAL COMPANY, ROCHESTER AND PITTSBURGH COAL
COMPANY, U.S. STEEL MINING COMPANY, INC., UNITED
STATES STEEL CORPORATION and CONSOLIDATION COAL
COMPANY,

Plaintiffs,

vs.

NICHOLAS DEBENEDICTIS, PHILIP ZULLO
and THOMAS B. ALEXANDER,

Defendants.

ORDER OF COURT

AND NOW, this 4th day of April 1984, the court finds
as follows:

(1) This court granted the motion of defendants and entered summary judgment against plaintiffs on all claims on February 29, 1984. *Keystone Bituminous Coal Assn., et al v. De Benedictis, et al.*, — F.Supp. — (W.D. Pa. 1984).

(2) Plaintiffs filed a timely motion for relief from judgment and a request that this court certify the questions raised in the motion of defendants for partial summary judgment, pursuant to 28 U.S.C. § 1292(b).

(3) In their motion for relief from judgment, plaintiffs aver that the record is inadequate to enter judgment on the question whether the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, 52 Pa.C.S.A.

§ 1406.1, *et seq.*, and regulations promulgated thereunder, constitute a *de facto* taking in violation of the Fifth and Fourteenth Amendments because they allegedly deprive plaintiffs of their investment-backed expectations in their property.

(4) Defendants filed an answer to the motion of plaintiffs in which they contend that this court properly disposed of all claims of plaintiffs in our opinion and judgment.

(5) We are reluctant to deprive any litigant of the opportunity to pursue discovery and present evidence on any issue that is deemed unresolved, particularly in a case of considerable importance to the parties and the citizens of this Commonwealth. We are also reluctant to add to the considerable burden of the Court of Appeals in the event that the contention of plaintiffs is correct.

(6) We will enter an order denying the motion of plaintiffs for certification because, in our judgment, the Court of Appeals should have the benefit of a complete record, if and when the case is submitted to that Court, especially in view of plaintiffs' contention that this court failed to resolve all the issues in this case and because an immediate appeal will not advance the ultimate termination of the litigation.

(7) We will grant the parties 90 days within which to pursue discovery pursuant to Local Rule 5 II: We deem this period adequate because the complaint was filed on December 16, 1982, the parties have engaged in considerable discovery to date, and counsel urged this court to enter the orders of October 17 and November 15, 1983.

IT IS THEREFORE ORDERED that the motion of plaintiffs for certification of the judgment of this court dated February 29, 1984, pursuant to 28 U.S.C. § 1292 (b), be and hereby is denied.

IT IS FURTHER ORDERED that the motion of plaintiffs "requesting relief and an amendment of judgment" be and hereby is granted to the extent that the parties shall be granted 90 days within which to pursue to discovery limited to the question whether the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act and the relevant regulations constitute a constitutionally infirm taking of plaintiffs investment backed expectations in their property.

IT IS FURTHER ORDERED that the parties shall comply with Local Rule 5 II and this case shall be scheduled for trial before the Honorable Donald E. Ziegler on July 23, 1984, at 10 a.m.

/s/ Donald E. Ziegler
DONALD E. ZIEGLER
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Plaintiffs,

v.

NICHOLAS DEBENEDICTIS, *et al.*,
Defendants.

ORDER

AND NOW, this 23rd day of April, 1984, upon consideration of the parties' joint motion, filed pursuant to 28 USC § 1292(b), to certify certain questions as immediately appealable, it is ORDERED that said Motion is granted and the Court does hereby certify as appealable the following questions:

Whether Sections 4, 6 and 15 of the Bituminous Mine Subsidence and Land Conservation Act and Sections 89.145, 89.146 and 89.147(b) of 25 Pa. Code,

1. Violate the Rule of the *Mahon* Decision
2. Constitute *Per Se* Takings,
3. Violate Article I § 10 of the Constitution of the United States.

The Court concludes that there is a substantial ground for a difference of opinion as to whether the above cited sections of Pennsylvania law are constitutional because a

prior law dealing with the same subject matter was invalidated as unconstitutional in *Pennsylvania Coal Company v. Mahon*.

The Court further concludes that an immediate appeal may materially advance the ultimate termination of this litigation because until the facial validity of the challenged provisions is finally determined, the extent to which the above provisions actually frustrate plaintiffs' investment backed expectations cannot be easily determined.

It Is Further Ordered that all other proceedings in the district court be and hereby are stayed.

/s/ Donald E. Ziegler
District Judge

APPENDIX G

PENNSYLVANIA BITUMINOUS MINE SUBSTANCE AND LAND CONSERVATION ACT

Section 4

Protection of surface structures against damage from cave-in, collapse, or subsidence

In order to guard the health, safety and general welfare of the public, no owner, operator, lessor, lessee, or general manager, superintendent or other person in charge of or having supervision over any bituminous coal mine shall mine bituminous coal so as to cause damage as a result of the caving-in, collapse or subsidence of the following surface structures in place on April 27, 1966, overlying or in the proximity of the mine:

(1) Any public building or any noncommercial structure customarily used by the public, including but not being limited to churches, schools, hospitals, and municipal utilities or municipal public service operations.

(2) Any dwelling used for human habitation; and

(3) Any cemetery or public burial ground; unless the current owner of the structure consents and the resulting damage is fully repaired or compensated.

1966, Sp.Sess. No. 1, April 27, P.L. 31, § 4. As amended 1980, Oct. 10, P.L. 874, No. 156, § 1, imd. effective.

Section 5(e)

An operator of a coal mine subject to the provisions of this act shall adopt measures and shall prescribe to the department in his permit application measures that he will adopt to prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability, and to maintain the value and reasonable foreseeable use of such surface land:

Provided, however, That nothing in this subsection shall be construed to prohibit planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining.

Section 6

Repair of damage or satisfaction of claims; revocation or suspension of permit; bond or collateral

(a) If the removal of coal or other mining operations by a holder of a permit granted under section 5¹ causes damage to structures set forth in section 4² of this act the permittee shall submit evidence that such damage has been repaired or that all claims arising therefrom have been satisfied to the department within six months from the date that the permittee knows, or has reason to know, such damage has occurred or, at the option of the permittee, within such period there shall be deposited with the Secretary of Environmental Resources as security for such repair or such satisfaction a sum of money in an amount equal to said damage or the reasonable cost of repair thereof, as estimated by a reputable expert. In default of the filing of such evidence or such deposit, the department shall suspend or revoke said permit.

No permit revoked or suspended pursuant to this section shall be reissued or reinstated until the applicant shall have furnished satisfactory evidence to the department that the damage for which the permit was revoked or suspended has been repaired or all claims arising therefrom satisfied, in accordance with this subsection.

(b) The department shall require the applicant to file a bond in a form prescribed by the secretary payable to the Commonwealth and conditioned upon the applicant's faithful performance of mining or mining operations, in accordance with the provisions of sections 4 and 5. Such bond shall be in a reasonable amount as determined by

the department. Liability under such bond shall continue for the duration of the mining or mining operation, and for a period of ten years thereafter or such longer period of time as may be prescribed by rules and regulations promulgated hereunder, at which time the bond shall become of no force and effect, and it, or any cash or securities substituted for it as hereinafter provided, shall be returned to the applicant. Upon application of any proper party in interest, the department, after due notice to any person who may be affected thereby, and hearing, in accordance with the provisions of section 5(g), may order the amount of said bond to be increased or reduced or may excuse the permit holder from any further duty of keeping in effect any bond furnished pursuant to a prior order of the department and return said bond, or the securities or cash posted in lieu thereof, to the permit holder, notwithstanding any different provision herein respecting the duration or term of said bond. Such bond shall be executed by the applicant and a corporate surety licensed to do business in the Commonwealth: Provided, however, That the applicant may elect to deposit cash, automatically renewable irrevocable bank letters of credit which may be terminated by the bank at the end of a term only upon the bank giving ninety days prior written notice to the permittee and the department or negotiable bonds of the United States Government or the Commonwealth of Pennsylvania, the Pennsylvania Turnpike Commission, the General State Authority, the State Public School Building Authority, or any municipality within the Commonwealth, with the department in lieu of a corporate surety. The cash deposit or irrevocable letter of credit or market value of such negotiable bonds shall be at least equal to the sum of the bond. Where the mining operation is reasonably anticipated to continue for a period of at least ten years from the date of application, the operator may, as an alternative, deposit collateral bond as provided for in this section according to the following phased deposit schedule. The operator shall,

prior to continuing operations, deposit ten thousand dollars (\$10,000.00) or 25% of the amount determined under this subsection, whichever is greater. The operator shall thereafter annually deposit 10% of the remaining bond amount for ten years. Interest accumulated by such collateral shall become a part of the bond. The department may require additional bonding at any time to meet the intent of this subsection. The collateral shall be deposited, in trust, with the State Treasurer, or with a bank, selected by the department, which shall act as trustee for the benefit of the Commonwealth, according to rules and regulations promulgated hereunder, to guarantee the operator's compliance with this act. The operator shall be required to pay all costs of the trust. The collateral deposit, or part thereof, shall be released of liability and returned to the operator, together with a proportional share of accumulated interest, upon the conditions of and pursuant to the schedule for release provided for by rules and regulations promulgated hereunder. In lieu of the bond required by this section, the department may require the operator of an underground mining operation to purchase subsidence insurance, as provided by the act of August 23, 1961 (P.L. 1068, No. 484), entitled, as amended, "An act to provide for the creation and administration of a Coal and Clay Mine Subsidence Insurance Fund within the Department of Environmental Resources for the insurance of compensation for damages to subscribers thereto; declaring false oaths by the subscribers to be misdemeanors; providing penalties for the violation thereof; and making an appropriation,"³ for the benefit of all surface property owners who may be affected by damage caused by subsidence. The insurance coverage shall be in an amount determined by the department to be sufficient to remedy any and all damage. The term of this obligation shall be for the duration of the mining and reclamation operation and for ten years thereafter. For all other surface effects of underground mining, the operator shall

post a bond as required by this section. The department shall, upon receipt of any such deposit of cash or irrevocable letter of credit or negotiable bonds, immediately place the same with the State Treasurer, whose duty it shall be to receive and hold the same in the name of the Commonwealth, in trust, for the purposes for which such deposit is made. The State Treasurer shall at all times be responsible for the custody and safekeeping of such deposits. The applicant making the deposit shall be entitled from time to time to demand and receive from the State Treasurer, on the written order of the department, the whole or any portion of any collateral so deposited, upon depositing with him, in lieu thereof, other collateral of the classes herein specified having a market value at least equal to the sum of the bond, and also to demand, receive and recover the interest and income from said negotiable bonds as the same become due and payable: Provided, however, That where negotiable bonds, deposited as aforesaid, mature or are called, the State Treasurer, at the request of the applicant, shall convert such negotiable bonds into such other negotiable bonds of the classes herein specified as may be designated by the applicant: And provided further, That where notice of intent to terminate a letter of credit is given, the department shall give the permittee thirty days written notice to replace the letter of credit with other acceptable bond guarantees as provided herein, and if the permittee fails to replace the letter of credit within the thirty-day notification period, the department shall draw upon and convert such letter of credit into cash and hold it as a collateral bond guarantee.

The department, in its discretion, may accept a self-bond from the permittee, without separate surety, if the permittee demonstrates to the satisfaction of the department a history of financial solvency, continuous business operation and continuous efforts to achieve compliance with all United States of America and Pennsylvania en-

vironmental laws, and, meets all of the following requirements:

(1) The permittee shall be incorporated or authorized to do business in Pennsylvania and shall designate an agent in Pennsylvania to receive service of suits, claims, demands or other legal process.

(2) The permittee or if the permittee does not issue separate audited financial statements, its parent, shall provide audited financial statements for at least its most recent three fiscal years prepared by a certified public accountant in accordance with generally accepted accounting principles. Upon request of the permittee, the department shall maintain the confidentiality of such financial statements if the same are not otherwise disclosed to other government agencies or the public.

(3) During the last thirty-six calendar months, the applicant has not defaulted in the payment of any dividend or sinking fund installment or preferred stock or installment on any indebtedness for borrowed money or payment of rentals under long-term leases or any reclamation fee payment currently due under the Federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1232, for each ton of coal produced in the Commonwealth of Pennsylvania.

(4) The permittee shall have been in business and operating no less than ten years prior to filing of application unless the permittee's existence results from a reorganization, consolidation or merger involving a company with such longevity. However, the permittee shall be deemed to have met this requirement if it is a majority-owned subsidiary of a corporation which has such a ten-year business history.

(5) The permittee shall have a net worth of at least six times the aggregate amount of all bonds applied for by the operator under this section.

(6) The permittee shall give immediate notice to the department of any significant change in managing control of the company.

(7) A corporate officer of the permittee shall certify to the department that forfeiture of the aggregate amounts of self-bonds furnished for all operations hereunder would not materially affect the permittee's ability to remain in business or endanger its cash flow to the extent it could not meet its current obligations.

(8) The permittee may be required by the department to pledge real and personal property to guarantee the permittee's self-bond. The department is authorized to acquire and dispose of such property in the event of a default to the bond obligation and may use the moneys in the Bituminous Mine Subsidence and Land Conservation Fund to administer this provision.

(9) The permittee may be required to provide third party guarantees or indemnifications of its self-bond obligations.

(10) The permittee shall provide such other information regarding its financial solvency, continuous business operation and compliance with environmental laws as the department shall require.

(11) An applicant shall certify to the department its present intention to maintain its present corporate status for a period in excess of five years.

(12) A permittee shall annually update the certification required hereunder and provide audited fi-

nancial statements for each fiscal year during which it furnishes self-bonds.

(13) The permittee shall pay an annual fee in the amount determined by the department of the cost to review and certify the permittee's application for self-bonding and annual submission thereafter.

(c) If it shall be determined by the department that the holder of a permit issued pursuant to the provisions of this act who has furnished a bond under this section, has failed or refused to comply with the provisions of this act, the department shall certify such determination to the Attorney General. The Attorney General shall proceed immediately to enter suit upon said bond and to collect such amount as may be necessary to redress or repair the damage occasioned by such violation, together with the costs of said proceedings. Where the holder of the permit has deposited cash or negotiable bonds as collateral in lieu of a corporate surety, the department shall declare such collateral forfeited and shall direct the State Treasurer to pay said funds or proceed to sell said collateral the pay the proceeds thereof to the department to be used in accordance with the purposes of this section. Should the amount so collected be insufficient to redress or repair the damage, the owner, operator, lessor, lessee, general manager, and superintendent or other person having charge of said mine or mining operation, shall be jointly and severally liable for the deficiency. Should the amount so collected exceed the amount necessary to restore or repair the damage occasioned by such violation, such excess shall be held by the department as collateral for future damage contemplated herein until all liability of the permittee is released.

1966, Sp.Sess., No. 1, April 27, P.L. 81, § 6. As amended 1980, Oct. 10, P.L. 874, No. 156, § 1, imd. effective.

KOHLER ACT

Mining so as to cause collapse of certain structures or places prohibited

It shall be unlawful for any owner, operator, director, or general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

(c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law.¹

(d) Any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or merchantile establishment in which human labor is employed.

(e) Any cemetery or public burial ground. 1921, May 27, P.L. 1198, § 1.

Maps and plans of workings or excavations; deposit with mayors or county commissioners; public records

Every owner, operator, lessor, lessee, or general contractor, engaged in the mining anthracite coal within this Commonwealth, shall make, or cause to be made, a true and accurate map or plan of the workings or excavations

of such coal mine or colliery, which shall be drawn to a scale of such size as to show conveniently and legibly all markings and numbers required to be placed thereon by the terms of this act. Such maps or plans shall also show, in detail and in markings of a distinctive color, all contemplated workings which are intended to be undertaken or developed within the succeeding six months. Such maps or plans shall be deposited, as often as once in six months, with the mayor in cities where such coal mines or collieries are situated. In boroughs and townships of the first class, such maps or plans shall be filed with the county commissioners of the proper county. Such maps or plans shall be considered public records, and shall be open to the inspection of the public, and copies or tracings may be made therefrom. No mining shall be done which is not shown on the map or plan filed at least ten days previously. 1921, May 27, P.L. 1198, § 2.

Designation and markings of coal pillars

Every owner, operator, lessor, lessee, or general contractor, engaged in the mining of anthracite coal, or any president, director, general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation in this Commonwealth, shall be, and is hereby, required: (a) To designate, within a period of six months from the passage of this act, and to keep designated by number, each and every pillar of anthracite coal beneath the surface still remaining in place at the time this act goes into effect and all pillars thereafter created, the number of each pillar to be placed in a conspicuous position with white paint or some other equally durable and visible substance; and (b) to designate or cause to be designated, by numerals of convenient and legible size, upon all mine maps or plans mentioned in section two of this act,¹ with the space on each map or plan designating any pillar of coal, the number of such pillar. 1921, May 27, P.L. 1198, § 3.

Access by municipal officers to mines

The mayor of cities, the burgess of boroughs, the boards of township commissioners of townships of the first class, and such engineers and other agents as they may employ, shall, at all reasonable times, be given access to any portion of any anthracite coal mines or mining operations which it may be necessary or proper to inspect, for the purpose of determining whether the provisions of this act are being complied with, and all reasonable facilities shall be extended by the owner or operator of such mine or mining operation for ingress, egress, and inspection. 1921, May 27, P.L. 1198, § 4.

Mining where pillars not designated; preventing mining in violation of act

The mayor of cities, the burgess in boroughs, the board of township commissioners in townships of the first class, shall have the power to prevent the mining of anthracite coal beneath the surface in any mine or mining operation in which the pillars of coal shall not have been numbered and the numbers thereof designated by maps or tracings as provided by this act; and where mining operations are being conducted in violation of this act, they shall have the power to prevent any miner or laborer, other than those necessary for the protection of life and property, from entering the mine or mining operation, until such time as the provisions of this act have been complied with. 1921, May 27, P.L. 1198, § 5.

Exceptions from operation of act

The provisions of this act shall not apply to townships of the second class, nor to any area within the surface overlying the mine or mining operation is wild or unseated land, nor where such surface is owned by the owner or operator of the underlying coal and is distant more than one hundred and fifty feet from any improved

property belonging to any other person. 1921, May 27, P.L. 1198, § 6.

Violations of act; penalty

Any owner, operator, lessor, lessee, or general contractor, engaged in the mining of anthracite coal, or any president, director, general manager, superintendent or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, who shall violate any provision of this act, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine of not more than five thousand dollars, or undergo imprisonment for not more than one year, both or either, at the discretion of the court. 1921, May 27, P.L. 1198, § 7.

Restraining violations of act

The courts of common pleas shall have power to award injunction to restrain violations of this act. 1921, May 27, P.L. 1198, § 8.

Construction of act

This act is intended as remedial legislation, designed to cure existing evils and abuses, and each and every provision thereof is intended to receive a liberal construction such as will best effect that purpose, and no provision is intended to receive a strict or limited construction. 1921, May 27, P.L. 1198, § 9.

Partial invalidity of act

It is hereby declared that the provisions of this act are severable one from another, and if, for any reason, this act shall be judicially declared and determined to be unconstitutional so far as relate to one or more words, phrases, clauses, sentences, paragraphs, or section thereof, such judicial determination shall not affect any other

provision of this act. It is hereby declared that the remaining provisions would have been enacted notwithstanding such judicial determination of the validity in any respect of one or more of the provisions of this act. 1921, May 27, P.L. 1198, § 10.

Time of taking effect of act

This act shall go into effect three calendar months after its final approval. 1921, May 27, P.L. 1198, § 11.

PENNSYLVANIA REGULATIONS

§ 89.145. General requirements.

(a) Underground mining activities shall be planned and conducted in a manner which prevents subsidence damage to the following:

(1) Public buildings and buildings customarily used by the public, including churches, schools, hospitals, court-houses, and government offices;

(2) dwellings, municipal utilities, and municipal service operations, in place on April 27, 1966;

(3) cemeteries existing on April 27, 1966;

(4) perennial streams and impoundments with a storage volume exceeding 20 acre feet;

(5) aquifers which serve as a significant source of water supply to any public water system; and

(6) coal refuse deposited under requirements of Chapter 90.

(b) The damage prohibited by subsection (a) includes the cracking of walls, foundations, and monuments; the draining of aquifers which serve as a significant source of water supply to any public water system; the draining of perennial streams; and the weakening of impoundments and embankments. Damage need not be prevented if done

with the consent of the current owner and the Department.

(c) Underground mining activities shall be planned and conducted in a manner which minimizes damage, destruction, or disruption of services provided by oil, gas, and water wells; oil, gas, and coal-slurry pipelines; railroads; electric and telephone lines; and water and sewage lines which pass over, under, or through the permit area; unless otherwise approved by the owner or these facilities and the Department.

(d) Underground mining activities shall be planned and conducted in a manner which avoids or minimizes damage to all other surface features listed pursuant to § 89.142 (relating to identification of structures and surface features). The damage to be avoided or minimized includes the cracking of walls, foundations, and monuments; the draining of surface waters; and the weakening of impoundments and embankments. Full extraction will be permitted if the resulting subsidence is controlled and designed to minimize the damage restricted under this Subsection.

(e) Underground mining activities shall be planned and conducted in a manner which maintains the value and reasonably foreseeable use of the overlying surface land prior to any mining.

(f) Underground mining activities shall be suspended beneath urbanized areas, cities, towns, and communities, and adjacent to industrial or commercial buildings, major impoundments or permanent streams, if the activities present an imminent danger to the inhabitants of the urbanized areas, cities, towns, or communities. An imminent danger exists if a reasonable person, subjected to the same condition or practice giving rise to the peril, would avoid exposure to the danger during the time necessary for abatement.

(g) Underground mining activities are prohibited beneath any area which is not included within a subsidence control plan which has been submitted pursuant to § 89.143 (relating to subsidence control plan) and has been approved by the Department.

§ 89.146. Mining methods.

(a) Underground mining activities shall be planned and conducted in accordance with the subsidence control plan required by § 89.143 (relating to subsidence control plan) and consistent with the postmining land use protected under § 89.88 (relating to postmining land use).

(b) At a minimum, the measures adopted to prevent subsidence damage, pursuant to § 89.145(a) (relating to general requirements), shall consist of the following:

(1) For each structure or feature to be protected, the operator shall provide a support area in which the amount of extraction is limited to 50%, leaving for support pillars of coal of a size and in a pattern which maximize bearing strength and are approved by the Department. No mining is permitted beneath a structure where the depth of overburden is less than 100 feet.

(2) The support area shall be rectangular in shape and determined by projecting a 15° angle of draw from the surface to the coal seam, beginning 15 feet from each side of the structure. For a structure on a surface slope of 5.0% or greater, the support area on the down-slope side of the structure shall be extended an additional distance, determined by multiplying the depth of the overburden by the percentage of the surface slope.

(3) When the distance between two support areas is less than the depth of overburden, then the area between the two support areas shall also be treated as a support area.

(4) If these measures fail to prevent subsidence damage, more stringent measures may be imposed or mining may be prohibited.

(5) Alternative measures may be adopted if it is demonstrated that they will prevent subsidence damage. In support of the demonstration, the Department may require.

(i) premining and postmining surface elevation surveys of a nearby area which core samples demonstrate to be geologically similar to the area of the protected surface features;

(ii) a history of mining in the surrounding area and a report listing all claims of subsidence damages resulting from that mining; and

(iii) an engineering report on the damage to be expected from the proposed mining pattern.

(c) If the demonstration can establish only that subsidence damage is unlikely, then the operator shall set up a monitoring program which will detect surface movement resulting from the mining operations. The program shall include monitors placed sufficiently in advance of mining so that mining can be stopped before the protected surface features are damaged; in calculating this distance, a 25° angle of draw shall be used.

(d) The measures adopted to minimize damage and disruption of services pursuant to § 89.145(c) (relating to general requirements) shall include, in addition to those discussed in § 89.143 (relating to subsidence control plan), the following:

(1) an engineering report on the damage to be expected from the proposed mining pattern; and

(2) a program for detecting any subsidence damage and avoiding any disruption in services.

(e) The measures adopted to avoid or minimize damage, pursuant to § 89.145(d) (relating to general requirements), may consist of any of those discussed in § 89.143(2)(i)-(iii) (relating to subsidence control plan), if the measures adopted, however, fail to avoid or minimize damage, then the operator will be required to adopt the measures imposed in Subsection (b) when minimum below the surface features listed in § 89.142 (relating to identification of structures and surface features). Nonetheless, full extraction will be permitted if the resulting subsidence is controlled and planned to minimize damage.

OPPOSITION BRIEF

85-1092

No. 84-2015

Supreme Court, U.S.

FILED

FEB 27 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

KEYSTONE BITUMINOUS COAL
ASSOCIATION, et al.

Petitioners,

v.

PETER S. DUNCAN, et al.

Respondents

RESPONDENTS' BRIEF IN OPPOSITION

Respectfully submitted,

LEROY S. ZIMMERMAN
Attorney General

BY: ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

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41PP

QUESTIONS PRESENTED

1. Whether state regulations requiring coal companies to leave coal in place to prevent subsidence damage to overlying structures and land amount to a taking of coal companies' property in light of the companies' failure to demonstrate the economic impact of the regulations on their businesses and the companies' retention of substantial property interests.

2. Whether state regulations which require coal companies to repair or compensate for damage to certain structures located above their mines despite the companies' having obtained waivers of liability for failure to support the surface amount to an unconstitutional impairment of contract where the Court of Appeals applied the appropriate legal test and concluded that the adjustment of rights produced by the state laws is reasonable and necessary to serve important public purposes.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 84-2015

KEYSTONE BITUMINOUS COAL
ASSOCIATION, et al.

Petitioners,

v.

PETER S. DUNCAN, et al.

Respondents

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-73a) is reported at 771 F.2d 707. The opinion of the District Court (Pet. App. 26a-42a) is reported at 581 F. Supp. 511.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 25a) was entered on August 26, 1985. Justice Brennan extended the time for filing a petition for writ of certiorari to December 24, 1985. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

Petitioners seek review of the Court of Appeals' decision rejecting facial constitutional challenges to major components of Pennsylvania's underground bituminous coal mine subsidence program. The case reached the Court of Appeals after partial summary judgment entered by the United States District Court for the Western District of Pennsylvania in favor of respondents.¹ In its judgment, the

¹The respondents, defendants below, are Pennsylvania's Secretary of the Department of Environmental Resources (DER) and two DER officials responsible for the Department's coal mine subsidence regulation program. (hereinafter collectively referred to as "DER").

District Court rejected petitioners'² claims that the coal mine subsidence control program is facially unconstitutional under the takings and contract clauses. App. 456a. The questions arising from this partial judgment were certified by the District Court for immediate appeal. Pet. App. 47a-48a. Awaiting decision in the District Court are the coal companies' claims that the coal mine subsidence control requirements are unconstitutional as applied and interfere in practice with the companies' investment-backed expectations.

²The petitioners, plaintiffs below, are five coal companies engaged in underground mining in Pennsylvania and an association of coal mining companies (hereinafter collectively referred to as "the coal companies").

1. The coal companies have challenged the provisions of state law which describe the surface features and structures which must be protected from subsidence damage; define the obligations of coal miners to compensate property owners or restore the land if subsidence damage occurs to protected structures or surface features; and, grant property owners the right to purchase coal necessary to support their land.³ The essence of the coal com-

³At issue are three statutory provisions, Sections 4, 6(a), and 15 of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act ("Subsidence Act" or "State Act"), Pa. Stat. Ann. tit. 52, §§ 1406.4, 1406.6(a), and 1406.15 (Purdon Supp. 1984); and portions of three regulations, 25 Pa. Code §§ 89.145, 89.146, and 89.147(b), which implement both these provisions and the requirements of the federal Surface Mining Control and Reclamation Act of 1979, 30 U.S.C. §§ 1201 et seq. ("Federal Act")

(FOOTNOTE CONTINUED ON NEXT PAGE)

panies' claims is that, as applied to tracts of land for which they have purchased the mineral rights together with waivers for damage caused to surface features and structures, the subsidence prevention and repair provisions amount to an uncompensated taking of private property for public use and an unconstitutional impairment of the obligations of contracts.

(FOOTNOTE CONTINUED)

or "SMCRA"). Petitioners also challenge DER's "support policy." Specifically, Section 4 of the Subsidence Act and Section 89.145(a) and (c) of the regulations describe the protected features and structures; Section 6(a) of the Subsidence Act and Section 89.147(b) of the regulations provide for repairs of subsidence damage and compensation for damages caused by subsidence; Section 15 of the statute offers property owners the opportunity to buy support coal. DER's "support policy" requires, with limited exceptions, that 50% of the coal be left under protected structures. 25 Pa. Code § 89.146.

The Subsidence Act was passed pursuant to the Commonwealth's "police powers" generally for the "protection of the health, safety and general welfare." Pa. Stat. Ann. tit. 52, § 1406.2 (Purdon Supp. 1984). The state General Assembly supported the statute with a detailed set of findings and declarations of policy. Pa. Stat. Ann. tit. 52, § 1406.3 (Purdon Supp. 1984). The legislature found that damage from coal mine subsidence had "seriously impeded land development" § 1406.3(2); individuals and businesses were understandably reluctant to build structures which may be damaged by subsidence. Subsidence damage "erodes the tax base", § 1406.3 (4); the tax base depends in large part on property value. The legislature concluded that the prevention of subsidence damage is "recognized

as being related to the economic future and well-being of Pennsylvania." §1406.3 (3). "Damage from mine subsidence has caused a very clear and present danger to the health, safety, and welfare of the people of Pennsylvania." § 1406.3(4).

2. The evidence before the District Court was in the form of stipulations and affidavits. The stipulations revealed that the coal companies, primarily during the time period 1890-1920, purchased the mineral rights to coal in western Pennsylvania. C.A. App. 151a.⁴ In purchasing the mineral rights, the companies included deed provisions by which the surface

⁴"C.A. App." refers to the appendix filed in the Court of Appeals.

owners waived their right to collect damages for harm caused to the surface or structures; granted to the coal companies the right to erect on the land structures to assist in the mining; permitted the coal companies to deposit waste on the land; allowed the companies to build roads, railroads and drains on the land; and, generally, authorized the companies to use the surface in a manner convenient with the mining of coal below. C.A. App. 151a-152a, 158a, 162a, 168a-169a, 171a, 173a, 174a, 175a, 177a, 180a, 181a, 182a-183a, 185a, 186a, 189a, 192a.

The impact of Pennsylvania's subsidence program on the coal companies' mining activities is reflected in several compilations of statistics prepared by DER in the course of this litigation. The amount of coal left

behind to support structures covered by the Subsidence Act averages 2.5% of the total coal in the mines for Consolidation Coal Co.; .75% for U.S. Steel Mining Co.; and .3% for Helvetia Coal Co. C.A. App. 416a. While the percentages vary from mine to mine, the percentage left in place as support is less than 2% of the total coal in the mine for 10 of the 13 mines for for which information has been provided. Ibid.

The information provided by the coal companies revealed that from 1966 through 1982 they paid approximately \$186,000 in damages pursuant to Section 6 of the Subsidence Act. More generally, DER's records reveal that all coal companies in Pennsylvania paid claims totaling \$2,339,544 resulting from

mining activities which produced 772,705,204 tons of coal, or \$.003/ton. C.A. App. 421a. According to DER's records, the average cost of repair for 375 damaged structures was \$6,255. C.A. App. 421a.

Since 1966, the owners of 86 structures located over only two of the coal companies' mines have purchased support coal pursuant to Section 15 of the Subsidence Act. C.A. App. 68a-69a. The amount of coal purchased as support for those 86 structures totalled .26% and .04% of the coal in those two mines respectively, and .02% and .01% of the coal in all of the mines of the two affected companies. C.A. App. 417a.

3. The District Court began its analysis by observing that the coal companies had not alleged that they had suffered any particular injury from

enforcement of the subsidence prevention and repair requirements; the question before the court was "whether the mere enactment of the [program] . . . constitutes a taking." Pet App. 27a. Addressing first the impairment of contracts claim, the District Court held that, although the program requirements impair the coal companies' contractual rights, the program advances "significant and legitimate" public goals. Pet. App. 31a. In rejecting the contract clause claim, the District Court found that the adjustment of rights and responsibilities prescribed by the subsidence program is reasonably related to and tailored to advance the Commonwealth's legitimate interests. Pet. App. 31a-32a.

Turning to the taking claim, the District Court first disposed of the coal companies' assertion that the case was controlled by Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Mahon dealt with a statute (the Kohler Act) which prohibited coal mining which caused subsidence. Pet. App. 32a-33a. But the District Court held that the current subsidence regulations differed from the prohibitions at issue in Mahon in at least three important respects: (1) the present program serves to protect public safety; (2) the Kohler Act was aimed at benefiting a small group of landowners, while the subsidence program is designed to prevent common, public harm; and (3) the Kohler Act, unlike the present program, did not apply to land owned by coal companies. Pet App. 33a-34a. Finding

these significant differences between the Kohler Act and the Sub-sidence Act, not to mention over 60 years of intervening caselaw, the District Court proceeded to an analysis of the taking issue under more modern precedents.

Although noting that the taking question turns on the facts of each case (Pet. App. 36a), the District Court identified and then rejected as inapplicable four general sets of circumstances which have been found to amount to a taking. This case involved no permanent physical occupation of private land by the government. The statute does not create a general easement for the public. These land-use regulations can be upheld as reasonably necessary to protect the health, safety

and general welfare. Pet. App. 39a.

Finally, the District Court confronted the argument that the subsidence program destroyed completely a recognized property right - the support estate. The court rejected this argument holding that the coal companies' property rights were only partially affected - for example, they still retained the right to gain access to their coal through the surface, they could dig shafts for access and ventilation, and they were permitted to disturb underground wells. Pet App. 39a-41a. Accordingly, the court rejected this claim.

4. The Court of Appeals agreed with the conclusions of the District Court. The Court of Appeals recognized that taking claims require individual analysis and that this Court has

employed a variety of concepts to test these claims. Pet. App. 8a-10a. In rejecting petitioners' assertion that Mahon controls, the Court of Appeals concluded that Pennsylvania's current statute, unlike the law reviewed in Mahon, was designed to and did serve broad public purposes in land development and protecting the tax base. Pet. App. 131.

Of critical importance to the Court of Appeals was the interrelationship between the so-called "support estate" and the other property interests held by the coal companies. The Court concluded that "because the [coal companies] still possesses valuable mineral rights that enable them profitably to mine coal" (Pet. App. 16a) the Subsidence Act did not amount to a taking of property.

Applying the test summarized by the Court in Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983), the Court of Appeals rejected petitioners' impairment of contracts claim. The Court of Appeals concluded that the Subsidence Act was a reasonable and necessary measure to prevent "subsidence damage [which had] devastated many surface features and thus endangered the health, safety and economic welfare of the Commonwealth and its people." Pet. App. 19a-20a.

ARGUMENT

1. Petitioners renew in this Court (Pet. 11-16) the argument that Pennsylvania Coal Co., v. Mahon, 260 U.S. 393 (1922), controls disposition of their takings clause challenge because Pennsylvania's regulatory scheme is "indistinguishable" from the requirements at issue in Mahon. This argument fails to take account of this Court's insistence that takings clause claims be evaluated on a case-by-case basis with particular attention to the economic impact of any challenged regulation on particular parcels of land.

a. In Mahon the Court "assumed" that the statute under review made it "commercially impracticable to mine certain coal." 260 U.S. at 414-415.

Since Mahon, the Court has stressed the importance of evaluating in each case "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, No 84-4 (June 28, 1985), slip op. at 17. Whatever may be the validity of the Court's assumption in Mahon that the statute before the Court rendered coal mining "commercially impracticable," it is premature for the Court to make a similar assumption in this case.

Although the limited record developed below identifies mining properties affected by the support requirements, there is no evidence of economic impact. In fact, what evidence there

is reflects that a negligible percentage of petitioners' coal reserves must be left in place. The District Court ruled only on petitioners' facial challenges to the subsidence control program leaving for resolution at a later time questions relating to the economic impact of the program as applied to particular mines and the degree to which the regulations interfere with petitioners' investment backed expectations.⁵ Pet. App. 44a-45a.

⁵In general terms, the Court of Appeals found that the support requirements do not interfere with petitioners' investment-backed expectations because it is unreasonable for a landowner to expect that he may use his property in a manner which frustrates legitimate public interests. Petitioners stretch this conclusion too far when they argue that the Court of

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b. In the absence of evidence of economic impact on particular parcels of land, a regulatory statute effects a taking only if it "denies an owner economically viable use of his land." Agins v. Tiburon, 447 U.S. 255, 260 (1980). Recently, in Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264 (1981), the Court employed this test and rejected a claim premised on Mahon to federal surface mining regulations.

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Appeals has "eliminated that factor" as a consideration in takings cases. Pet. 17. In fact, final determination of petitioners' claim that their investment-backed expectations have been frustrated awaits further factual development in the District Court; this claim was specifically reserved by the parties for future litigation. Pet. App. 48a.

Here there is no claim by petitioners that their mines no longer are economically viable. Petitioners do not confront this flaw in their analysis preferring instead to isolate their ownership of the support estate and to argue that Pennsylvania's subsidence control program abolishes this property right. What petitioners ignore is that, regardless of whether or not the support estate is a separate property right, petitioners' entire bundle of property rights includes far more than the support estate. They own vast expanses of land and mineral rights which were purchased simultaneously with a variety of other property interests, including waivers of liability for failure to support the surface; the right to deposit waste on the surface; the right to traverse the surface to gain access

to the minerals; the right to sink mining shafts through the surface; and, the right to erect buildings, railroads, or other structures necessary to conduct mining. C.A. App. 151a-152a, 158a, 162a, 168a-169a, 171a, 173a, 174a, 175a, 177a, 180a, 181a, 182a-183a, 185a, 186a, 189a, 192a. Even the complete destruction of one particular property interest from among many held by the landowner fails to state a taking claim. Andrus v. Allard, 444 U.S. 51 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).⁶

⁶Petitioners do not argue that the character of the governmental action itself establishes a taking without regard to impact on the landowner. The Court has found per se takings only when the regulation permits another to invade or occupy the land. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

Although the regulations at issue here may be similar to those before the Court in Mahon, that is not to say that all such regulations are per se unconstitutional. If there is one central theme running throughout the takings jurisprudence developed by this Court over the last sixty years, it is that each case must be examined on its own facts. The way in which this case has developed leaves the Court with insufficient facts upon which to resolve whether the support requirements have a sufficient impact on petitioners' property to amount to a taking. Petitioners' claim is not appropriate for review at this time.⁷

⁷Petitioners seem to center their criticism of the Court of Appeals' decision on what they view as an improper balancing of the public

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2. Petitioners argue (Pet. 19-27) that the Subsidence Act's requirements that damage to structures be repaired or compensated, Pa. Stat. Ann tit. 52, § 1406.6 Purdon Supp. 1984), violates the contract clause, U.S. Const. Art. I, § 10. The Court of

(FOOTNOTE CONTINUED)

interest against the impairment of petitioners' property interests. In so arguing, petitioners ignore this Court's repeated reliance on the strength of the public interests at stake in rejecting takings claims. See, e.g., Agins v. Tiburon, 447 U.S. 255 (1980); Penn Central Transportation Co. v. New York City, supra. It is undeniable, as the Court of Appeals found, that the Subsidence Act serves broad, important purposes in preserving land for development, safeguarding the tax base and protecting public safety. Pet. App. 13a-14. The Act, therefore, is distinguishable from the statute at issue in Mahon. See Pet. App. 12a-13a. In any event, as we discuss above, a weighing of the magnitude of the public interest at stake is not essential to reject petitioners' submission.

Appeals properly applied the well-settled test developed by this Court to judge impairment of contracts claims.

a. Although the constitutional prohibition against the impairment of contracts is facially absolute, "its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" Energy Reserves Group, Inc. v. Kansas Power and Light Company, 459 U.S. 400, 410 (1983), quoting Home Bldg. and Loan Assoc. v. Blaisdell, 290 U.S. 398, 434 (1934). The threshold inquiry is "'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" Energy Reserves Group, Inc. v. Kansas Power and Light Company, supra, 459 U.S. at 411, quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

Assuming there is a substantial impairment, the state must justify its law by a "significant and legitimate public purpose behind the regulation." Ibid. Remediating broad and general social or economic problems are sufficient public purposes; there need not be an emergency or temporary situation. Id. at 412. The "requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." Ibid.

Finally, when a legitimate public purpose has been identified, the inquiry turns to whether the adjustment of the rights and responsibilities of the contracting parties is based "upon reasonable conditions and [is] of

character appropriate to the public purpose justifying the legislation's adoption." Id. at 412, (alterations in original; citation omitted). Moreover, "unless the State itself is a contracting party, . . . 'courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" Id. at 412-413, quoting United States Trust Company v. New Jersey, 431 U.S. 1, 22-23 (1977).

In applying this test to the case before it, the Court of Appeals properly concluded, and petitioners do not dispute, that "subsidence damage devastated many surface structures and thus endangered the health, safety and economic welfare of the Commonwealth and its citizens." Pet. App. 19a-20a. The repair and compensation requirements

plainly are directly related to alleviating this widespread problem; they are a "reasonable and necessary" means of preventing and correcting subsidence damage.

There is no need to clarify the proper test for contract clause claims. Although the Court of Appeals analogized the deferential standard which it was applying to the inquiry for "reviewing economic and social legislation in other contexts" (Pet. App. 19a), there is no basis for arguing that the court applied a due process test. Instead, the court adhered to the standards prescribed by this Court.⁸

⁸Petitioners claim (Pet. 23 N. 26) that the requirements of Section 6 of the Act are not "necessary" because insurance can be provided to cover

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b. Petitioners' assertion (Pet. 21-22) that the Court of Appeals erred in failing to conclude that the Subsidence Act was a response to unforeseen developments must fail. First, petitioners never asserted, either in the Court of Appeals or the District Court, that the Subsidence Act was a response to problems known at the time the contracts were executed. Secondly, as the legislative findings supporting the Act demonstrate, the development of land in areas where mining activity was conducted and the inadequacy of prior laws in protecting

(FOOTNOTE CONTINUED)

damage from subsidence. The overriding purpose of the Act is to prevent subsidence damage; repair is a last resort if all reasonable methods of prevention are unsuccessful. Insurance does nothing to prevent damage in the first place.

the public interest had produced "a clear and present danger" to the economic well-being and safety of the people of Pennsylvania. Pet. App. 33a-35a n.2.

It takes no great familiarity with the particular problems of Pennsylvania to appreciate that during the late 1800's and the early part of this century when these agreements were reached, there existed neither the scarcity of land for development nor the pressure on municipal tax bases which exist today. These developments were unforeseeable at the turn of the century and petitioners have offered no concrete evidence for concluding otherwise.

c. Petitioners argue (Pet. 25-27) that the decision by the Court of Appeals on the contract clause issue

conflicts with decisions in other circuits. This claim is without merit.

In Minnesota Assoc. of Health Care Facilities v. Minnesota Department of Public Welfare, 742 F.2d 442 (8th Cir. 1984), cert. denied, 105 S.Ct. 1191 (1985), the court applied the same three-part test applied by the Third Circuit in this case. The Eighth Circuit simply concluded that a policy of holding down medical costs was not reasonably served by a provision requiring refunds of charges already paid. By contrast, the Third Circuit in this case found it entirely reasonable for the legislature to conclude that the health, safety and economic well-being of the Commonwealth's citizens would be well-served by regulations controlling coal mine subsidence. There is no

conflict in approach - just different circumstances.

La Fortune v. Naval Weapons Center Federal Credit Union, 652 F.2d 842 (9th Cir. 1981), reflects no conflict with the decision below in this case. Simply put, there were no legislative findings or other evidence presented to support the judgment that retroactive application of a dwelling home exemption was necessary for other than benevolent reasons. Similarly, Garries v. Hanover Insurance Co., 630 F.2d 1001 (4th Cir. 1980) (involving a statute granting private enforcement of insurance laws) was a case in which the court found that the provisions protected "private interests . . . rather than any broader societal interest." Id. at 1009. The Third Circuit

rested its decision here on uncontroverted legislative findings of a generalized need for relief from subsidence damage. There is no conflict.⁹

⁹Petitioners cite a passage from Peick v. Pension Benefit Guaranty Corp., 724 F.2d 1247, 1264 (7th Cir. 1983), which they claim (Pet. 26) demonstrates a conflict. But the Peick court did not even conduct a contract clause analysis - it construed the claims as a due process challenge. Id. at 1263.

CONCLUSION

The petition for writ of
certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

No. 85-1092

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Petitioners,
v.
PETER S. DUNCAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

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IN THE
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KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Petitioners,

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REPLY BRIEF OF THE PETITIONERS

The petition presents two questions: whether Pennsylvania law, which requires petitioners to leave 50% of their coal under numerous protected surface structures, constitutes an uncompensated taking of property without just compensation in violation of the Fifth Amendment; and whether a Pennsylvania statute, which requires petitioners to compensate the surface owner for or repair any damages to protected structures from subsidence in clear and admitted disregard of express contractual provisions, violates the Contract Clause of the Constitution. Article I, § 10, cl.1. Respondents have presented several arguments in opposition that warrant a brief reply.

I. THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT.

1. As explained in the petition, the decision of the Third Circuit in this case was completely unfaithful to the holding of this Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), in which the Court struck down a virtually identical Pennsylvania statute. Respondents concede (Br. in Opp. 25) that "the regulations at issue here may be similar to those before the Court in *Mahon*," but assert that developments in "takings jurisprudence . . . by the Court over the last sixty years" support the Third Circuit's holding that the 50% rule is not an unconstitutional taking. But, this is precisely why the Court should grant the petition—in order to decide where *Pennsylvania Coal* fits in the developing case law of this Court concerning takings. Respondents thus concede that the issue of the meaning of *Pennsylvania Coal*, which is of critical importance to petitioners specifically and to the entire coal industry,¹ is squarely presented by the decision below.

Moreover, respondents' analysis of why Pennsylvania's 50% requirement does not constitute a taking under the more recent decisions of this Court is clearly wrong. It amounts to an argument that the states can lawfully take a little bit of property without compensation, so long as the ultimate effect of the taking is not economically devastating measured against the property owner's assets.² Respondents have admitted that under the 50% rule actual, identifiable coal has been, is being and will be left in the ground *solely* to advance the State's effort to promote its tax base and to encourage economic development. (Br. in Opp. 8, 12). But respondents argue

¹ See Brief of the National Coal Association, *et al.* as *Amici Curiae* at 2-7.

² This type of argument was clearly rejected in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

that as a percentage of the coal industry's total coal reserve, the amount the State requires petitioners to abandon is relatively insignificant. But this cannot be the proper standard. Under respondents' reasoning, if General Motors owned 100 plants, Pennsylvania could simply seize one of them without compensation and it would not be a taking because GM still would have enormous holdings.

This is not a case like zoning or historic preservation where the state's action merely reduces the economic value of the property. Compare *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Pennsylvania is compelling petitioners to abandon permanently 30 million tons of coal in the ground in order to serve the State's interest in economic development. The State is not regulating land use; it is taking property for a public purpose.³

2. Respondents do not contest petitioners' claim (Pet. 14) that the court of appeals balanced the government and private interests in deciding whether the State's action constituted a taking. Nor do they dispute the claim that this approach conflicts with prior decisions of this Court, including *Pennsylvania Coal*. Instead, they assert (Br. in Opp. 26 n. 7) that other decisions of this Court support a balancing test. But we acknowledged that fact in the petition (Pet. 14) and argued that this inconsistency should be resolved by this Court. Thus, respondents, in effect, support our argument that this case is a

³ Respondents make no attempt to defend the Third Circuit's complete disregard of the support estate as a distinct, state-recognized property right. As we explained in the petition, the Third Circuit simply ignored state law on that issue because to treat this right separately, "would serve little purpose." Pet. 12; Pet. App. 15a. Respondents do not respond to our argument that the court of appeals' reasoning directly conflicts with numerous decisions of the Court, including *Pennsylvania Coal*, which held that property rights protected by the Fifth Amendment are defined by state law and a federal court may not disregard those definitions as the Third Circuit did here.

proper vehicle for deciding the fundamental issue of what is the proper legal standard for deciding what constitutes a regulatory taking.

3. Notwithstanding respondents' concession that the decision in this case can only be upheld if *Pennsylvania Coal* has been overruled *sub silentio* by more recent takings decisions of this Court, they argue that it is inappropriate to resolve this issue now because the record is not adequate to demonstrate fully the economic effects of Pennsylvania's law.

But the record in this case is completely adequate to raise and to permit the Court to dispose of the takings question. Pursuant to Pennsylvania's laws and the regulations issued thereunder, petitioners already have lost specific coal. The record discloses, and respondents do not dispute, that the 50% rule already has required tons of petitioners' coal to be left in the ground and eventually will require petitioners alone to leave unmined at least 30 million tons of coal. Pet. 4. Thus, this case is not like *Hodel v. Virginia Surface Mining and Reclamation Ass'n.*, 452 U.S. 264, 296-297 (1981), where plaintiff could not show what effect, if any, the regulations might have on any specific surface property. There is no question that Pennsylvania's law is having a concrete economic impact upon petitioners that requires immediate resolution.⁴

Moreover, the Third Circuit's holding adversely affects many more coal operators and owners than peti-

⁴ Nor would anything be gained now by having a trial on the issue of petitioners' reasonable investment-backed expectations in being able to mine all of the coal they purchased. As respondents concede (Resp. Br. 21 n.5), the court of appeals held that petitioners' investment-backed expectations were subject to possible future government regulation. In light of this holding, the district court, which is bound by the decision of the court of appeals, could not possibly hold that the State's regulation of coal mining unlawfully interfered with petitioners' reasonable investment-backed expectations.

tioners. Planning for the development of millions of tons of coal is being directly impeded by the holding that, notwithstanding *Pennsylvania Coal*, the states can require coal operators to surrender their right to mine all of their coal, a right assured by their acquisition of the support estate. So long as the 50% rule remains in effect, there will be entire mines which cannot be competitively used because the longwall method of extraction will be unavailable. See Pet. 5-6. The coal industry must know now what coal it can profitably mine, and it cannot make any reasonable plans until this Court decides whether *Pennsylvania Coal* is still the "leading case" on the issue of when state regulation goes too far and constitutes an unconstitutional taking. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978).

In short, if the Constitution prevented Pennsylvania in 1922 from requiring the owners of coal to leave it in the ground in order to serve Pennsylvania's purposes, the same principle should obtain today. At the very least, the guarantee against uncompensated takings is too important for this Court's leading case to be overturned by the only court of appeals that has jurisdiction to review this latter-day successor to the Kohler Act.

II. THE CONTRACT CLAUSE OF ARTICLE I, SECTION 10.

Respondents concede, as they must, that Section 6 of the Subsidence Act severely and retroactively impairs petitioners' contracts with surface owners by nullifying the contractual provisions requiring surface owners to bear the cost of subsidence damage and by shifting that cost to the mine operators. Opp. 9-10, 13. See also, *id.* 26-35 (no dispute that impairment is substantial in a constitutional sense). Cf. Pet. 20-21. They then fail, by silence or by error, to rebut the three reasons advanced by petitioners which justify plenary review of the contract clause issue.

First, review should be granted because, for the reasons detailed in the petition, the decision of the court of appeals applied a highly deferential, rational relationship standard of review to a state law severely impairing private contracts and is thus in square conflict with the "reasonable and necessary" Contract Clause test announced by this Court in *Home Building and Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). Pet. 19-23. This Court has never held—as the Third Circuit held in this case—that the standard for Contract Clause cases is the same as for substantive due process challenges to state economic regulation. For this reason alone, review is necessary to resolve a profound conflict between the decisions of this Court and the court of appeals on the construction of a major constitutional provision.

Respondents do not dispute that the court of appeals ignored the fundamental rule of *Spannaus*, 438 U.S. at 245, that the "severity of the impairment [of private contracts] measures the height of the hurdle the state legislation must clear." Cf. Pet. 21. In particular, respondents do not dispute that the "reasonable and necessary" test has certain unique elements established by the decisions of this Court: to justify a severe impairment of private contract a state must show (i) that the contract had created unforeseen problems of public policy; (ii) that the statute is reasonable in light of changed circumstances under certain explicit criteria set out in *Blaisdell* and *Spannaus*; and (iii) that the statute could not have achieved its legitimate objectives in ways less damaging to contractual expectations. Pet. 21-23. Nor do respondents dispute that the court of appeals failed completely to apply any of those three elements of the "reasonable and necessary" test. Instead, respondents weakly—and erroneously⁵—make their own arguments

⁵ For example, with respect to the foreseeability issue, respondents cite certain legislative findings and claim that a major new

to this Court that some elements of the test are satisfied. Opp. 30-32. But respondents' incorrect, after-the-fact arguments cannot cure the fundamental constitutional error of the court of appeals.

Second, plenary review should be granted to clarify that this Court's decision in *Energy Reserves Group, Inc. v. Kansas City Power & Light Co.*, 459 U.S. 400 (1983) did not, directly or by implication, reject or modify the *Blaisdell-Spannaus* "reasonable and necessary" test as applied to state impairments of private contracts. Respondents repeat the court of appeals' error by taking certain sentences from *Energy Reserves* out of the context of this Court's Contract Clause adjudication and then arguing incorrectly that, even when there is severe impairment of a private contract, courts should give great deference to legislative judgments. Compare Pet. 23-25 with Opp. 29.⁶

problem had arisen. But these findings do not show that the problem which led the state legislature to shift the cost of subsidence damage from surface owners to mine operators was not foreseen when the contracts were executed. See Pet. 22, n.23; Opp. 31-32. Instead, the findings cited by respondents relate to problems requiring prevention of future subsidence damage (not compensation for damage that has occurred, or will occur).

Moreover, respondents' discussion of the "necessary" element of the Contract Clause test is wholly irrelevant because it focuses on the Subsidence Act's prevention of damage measures rather than the cost-shifting effects of Section 6, the provision impairing contracts. Opp. 30, n.8. Respondents' in their opposition do not, therefore, dispute the argument in the petition that the state-sponsored insurance program, with its small premiums, adequately protected surface land owners from the cost of damage which does occur—and that therefore Section 6 was not "necessary" in a constitutional sense. See Pet. 23, n.26.

⁶ Respondents rely on a sentence from *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22-23 (1977) quoted in *Energy Reserves*. Opp. 29. But respondents make no attempt to answer petitioners' argument that the sentence from *U.S. Trust* related not to the

Third, review by this Court is necessary to resolve a conflict in the circuits regarding application of the "reasonable and necessary" test to laws retroactively impairing private contracts. Pet. 25-27. Respondents are simply wrong when they state that the Eighth Circuit, in *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dept. of Public Welfare*, 742 F.2d 442 (8th Cir. 1984), cert. denied, 105 S.Ct. 1191 (1985), applied the same Contract Clause test as the Third Circuit in this case. Opp. 33. In striking down a statute which retroactively interfered with a private contract between nursing homes and their patients, the Eighth Circuit, in sharp contrast to the Third Circuit, gave substantial weight to the contract-based expectations of the parties. The Eighth Circuit concluded that, even though the state had a legitimate health cost control purpose, that purpose could not override "settled and completed financial arrangements under contracts made in reliance on [then] existing law." 742 F.2d at 451. Thus, the Eighth Circuit applied a more stringent Contract Clause standard of review than the deferential rational relationship test applied by the Third Circuit which, despite "settled and completed financial arrangements" under contracts between the mine operators and surface land owners made "in reliance" upon pre-existing law, upheld Section 6's complete nullification of those expectations and of the contracts' effect.

Similarly, respondents are simply wrong in attempting to minimize the conflict between this case and *LaFortune v. Naval Weapons Center Federal Credit Union*, 652 F.2d 842 (9th Cir. 1981). In *LaFortune*, the Ninth Cir-

nature of the "reasonable and necessary" test, but instead to the issue of when the "reserved powers doctrine" applies. Pet. 24, n.27.

Nor do respondents answer petitioners' argument that the fundamental holding of *Energy Reserves* was that there was no impairment in a constitutional sense and that, to the extent the Court reached the question of applying the "reasonable and necessary" test, it was in the context of a "minimal" not "severe" impairment of contract. Pet. 24, n.28.

cuit expressly applied the "necessary" element of the "reasonable and necessary" test and concluded that the state failed to show that its purpose could not be accomplished in ways less destructive of contractual expectations. *Id.* at 848 ("it has not been shown that there was a necessity for the retroactive application" of the statute). Here, of course, the Third Circuit completely ignored the "necessary" elements of the "reasonable and necessary" test.⁷

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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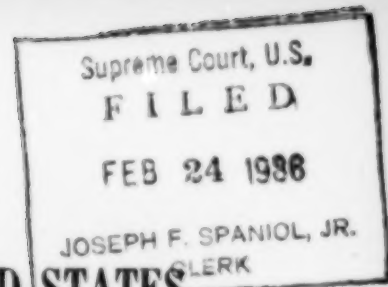
⁷ Moreover, in contrast to respondents' claim, the Fourth Circuit in *Garris v. Hanover Insurance Co.*, 630 F.2d 1001 (4th Cir. 1980), clearly applied a more stringent standard of Contract Clause review than the Third Circuit in striking down a statute retroactively impairing private contracts. For example, the Fourth Circuit expressly analyzed the case in terms of the *Blaisdell-Spannaus* heightened "reasonableness" criteria ignored by the Third Circuit here. 630 F.2d at 1008-1011. See Pet. 22.

AMICUS CURIAE

BRIEF

2
No. 85-1092

IN THE
SUPREME COURT OF THE UNITED STATES



October Term, 1985

KEYSTONE BITUMINOUS COAL ASSOCIATION,
HELVETIA COAL COMPANY, ROCHESTER &
PITTSBURGH COAL COMPANY, U.S. STEEL
MINING CO., INC., UNITED STATES STEEL
CORPORATION AND CONSOLIDATION COAL
COMPANY,

Petitioners

v.

PETER S. DUNCAN, PHILIP ZULLO
and THOMAS B. ALEXANDER,

Respondents

**BRIEF OF AMICI CURIAE
MID-ATLANTIC LEGAL FOUNDATION,
TRI-STATE COAL OPERATORS
ASSOCIATION AND WILLIAM BOYLE
IN SUPPORT OF PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT**

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February 1986

Questions Presented

A. Should this Court's acknowledged benchmark decision in "takings" jurisprudence be allowed to be overruled by a Court of Appeals?

B. May a state legislature nullify a decision of this Court on a matter of federal constitutional law?

C. May a state legislature nullify due process rights guaranteed by the Fifth Amendment, as made applicable to the states by the Fourteenth Amendment, and as interpreted by this Court, by a statement of its version of proper public policy?

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INTERESTS OF AMICI

Pursuant to this Court's Rule 42, Mid-Atlantic Legal Foundation, Tri-State Coal Operators Association and William Boyle hereby move this Court for leave to file the

attached brief as *amici curiae*. Consent was secured from counsel for all parties. Copies of the letters of consent have been filed with this Court.

Tri-State Coal Operators Association ("TSCOA") is a non-profit organization, primarily founded to encourage and foster the security of independent coal mining operators and to promote stable and harmonious relations among its members, service and support industries, other indirect industries and the general public. It currently has forty-six members, consisting of coal operators, service and support industries and indirect industries in the area of West Virginia, Maryland and Pennsylvania.

TSCOA's members operate both surface and sub-surface mines, several of which have been affected by the statute at issue in this case, Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act. (52 Pa. Cons. Stat. Ann., §§ 1406.1-1406.21) ("Subsidence Act").

William Boyle is a vice-president and shareholder of Viking Coal Company, Kingwood, West Virginia, a member company of TSCOA.

Mid-Atlantic Legal Foundation is a non-profit, tax exempt corporation organized and existing under the laws of Pennsylvania. It is a public interest law firm which participates in litigation involving matters of broad public interest such as the instant case.

STATEMENT OF THE CASE

For the sake of brevity *amici* do not separately set forth their statement of the case but adopt that set forth by the petitioners in their petition.

REASONS FOR GRANTING CERTIORARI

A. *Mahon* Directly Overruled

This case was effectively decided by this Court 64 years ago in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

With respect to the underlying facts, the regulatory scheme and the regulatory effects, the Subsidence Act and its regulations addressed in the case at bar are operationally identical to the Kohler Act addressed in *Mahon*. (See Petition appendix, at 57a *et seq.*)

Both seek to regulate coal mining throughout Pennsylvania. Both effect a transfer of valuable and paid for property rights (the support estate). Both amend valuable and paid for contract rights (negotiated disclaimers and assumptions of liability). Both impose physical restraint upon private property. Both prohibit the use of private property. Both prohibit the use of investment backed property for its intended, and only, profitable purpose. Both purport to protect essentially identical classes of surface structures. Both would operate to require a portion of coal to be left in place in support of surface structures. Both purport to have been enacted in the exercise of police power for the benefit of the public safety and general welfare.

The only distinction in the operative provisions of the two Acts, is that one applies to anthracite coal and one applies to bituminous coal, a distinction patently devoid of any legal difference.

Most importantly, whether the *Mahon* holding be viewed as narrowly restricted to its facts, or whether its rationale is viewed as broadly applicable to state actions of the type presented here, it was and is binding as a matter of constitutional declaration upon the Pennsylvania legislature, and binding on the Third Circuit as a matter of *stare decisis*. At the very minimum, if the holding of *Mahon* is to be overruled and *stare decisis* bent, it

is this Court and this Court only which is the proper authority to effect that action.

Precisely because *Mahon* and the Kohler Act and this case and the Subsidence Act are identical in effect, it is imperative that this Court grant review in order to protect the country's economic system and underlying investments undertaken in reliance upon the constitution's "takings" clause, its contracts clause and decisions of this Court interpreting both.

B. Public Reliance on *Mahon*

Whatever confusion surrounds "takings" jurisprudence in other connections, it is quite clear that the "takings" clause was designed to promote and protect private ownership and private investment.

With respect to coal mine operators standing alone, two separate groups of investors appear who have had a right to rely on *Mahon* as the declaration of the law of the land. The first are those persons who invested in bituminous mines prior to *Mahon* and who have read *Mahon* to say that their rights to ownership and to compensation if their property is taken by the state, are both protected as a constitutional matter. The second group are those persons who, subsequent to *Mahon*, have invested in bituminous mines, again relying on *Mahon* as the declaration of their constitutional rights.

Beyond the two groups of investors in coal mining properties, lie two more whose investments will be put at seriously increased risk without review by this Court: first, those who have invested in sub-surface mining property other than coal; and, second, all other investors who have made their decisions in reliance on declarations of this Court, but whose industries and/or properties may be the subject of state or local action.

In short, because the Subsidence Act so directly conflicts with *Mahon*, the adverse effects of leaving the instant case unreviewed may impact on practically any investment endeavor, to a greater or lesser degree.

The risks properly taken by all such investors are those of the market place. Investors have a right to rely on the declarations of this Court to define their rights with certainty. The risk of investment does not bring with it the risk that the whim of a legislature will be allowed to overrule the law of the land. Even with respect to acts of congress at the federal level, it is an unusual situation in which this Court allows its constitutional declarations to be offset by new congressional statutory action. To allow declarations of this Court on constitutional grounds to be overridden by statements of 50 state legislatures that their public "want[s] the property very much," is in effect to transfer declarations of constitutional rights and duties to those legislatures. (*Mahon*, 260 U.S., at 415).

Failure of this Court to review, and indeed reverse, the holding below will bode ominously for all investment, will go far to render existing "takings" jurisprudence meaningless, and invite the condition of which Justice Holmes spoke in *Mahon*, in which private property disappears altogether. (*Id.*)

C. The Legislative End Run

The legislature knew that the operative provisions of the Kohler Act and the Subsidence Act were to be the same. It was faced with the constitutional declaration of *Mahon* that the exercise of police power for public purposes, to the extent effected by the Kohler Act, and now newly contemplated by the Subsidence Act, was an insufficient constitutional justification for the "taking". The Pennsylvania legislature therefore sought in the Subsidence Act to end run this Court by adorning the

statement of purposes simply with one or two new statements of why the public wants the private property, principally, the prevention of tax base erosion and promotion of surface development. The drafting of such specific enumerations of elements of the general welfare is insufficient to justify the state doing what this Court has already decided it cannot do.

The Subsidence Act adorns the Kohler Act's purposes by reciting as policy declarations specific reasons why "the public want[s] the [property] very much" (*Mahon*, 260 U.S., at 415), and, tellingly, the Court of Appeals supplied new purpose language of its own.

The legislature recited that the "takings" under the Subsidence Act were necessary to preserve the land, preserve the state's tax base and promote surface land development.

The Court of Appeals translated those purposes into the economic future of the Commonwealth and its "well-being."

The effects of mining subsidence have been known for a century. They are the very effects which gave rise to the support estate and which were the subject of state-sanctioned contractual arrangements apportioning risk and resulting damage. They were exactly the effects at issue in *Mahon*.

The state was once proscribed by this Court from exercising its police power in the fashion it now seeks to do. State legislatures should not be allowed to avoid the constitutional duty to pay private owners by assigning to the actions new labels, particularly obscure and general ones, *e.g.*, land preservation or preservation of the tax base (*i.e.*, production of public income), or, as the Court of Appeals supplied, the economic future of the state. If such draftsmanship is allowed to avoid constitutional decisions of this Court and allowed to violate declared constitutional rights, the "takings" clause will have become the plaything of legislatures, as will the private property the "takings" clause was designed to protect.

The terminology of the Court of Appeals is illustrative of the trendiness to which the "takings" clause would become subject under the holding below. Could Pennsylvania constitutionally prohibit all manufacturing and order all plants to be closed on the ground that the economic future of the state would be better served by encouraging building for service industries? The answer is clearly no. But the sanctioning of easy labels for adornment of police power purposes could yield such a result.

Assuming, *arguendo*, that such adornments were deemed proper, the stated purposes for the Subsidence Act in fact go too far.

Amici suggest that a statement of purposes coupled with ordered actions or restrictions may define a "taking" — and that that has patently occurred here. This is not a case of the exercise of the police power to protect discrete aspects of public life, *e.g.*, to protect safety, or health, or morals, or even discrete actions which may bear on the general welfare.

Rather, in attempting to circumvent *Mahon*, the legislature has in fact ordered the dedication of private property to broad public economic gain. It has directly converted private, physical, productive assets to public assets. It has prohibited the continued dedication of those assets to private profit and ordered them to be affirmatively, continuously, physically devoted to public profit: to the physical support of real estate development and to the production of public income through taxation.

By their terms, the stated purposes of the Subsidence Act are not a mere negative or passive regulation simply restricting some use of private property. They effect an affirmative conversion of private assets to public assets, no less than if a bill of sale or a deed in fee simple had been ordered to be filed transferring ownership to the state. The state has taken the property and must compensate for it.

"[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (*Mahon*, 260 U.S., at 416).

Perhaps the most serious aspects of the stated purposes of the Act, as ratified by the court below, are the economic assumptions they evidence, *viz.*: that the state is better equipped to predict and direct future economic development than are the free forces of the marketplace, and that in order to promote the state's vision of the proper economic future, it is justified not only in frustrating the fruition of privately invested assets, but in seizing them for the benefit of the state.

D. "Takings" Theories Mis-Applied Below

The Subsidence Act effects a compensable "taking" under three separate theories pronounced by this Court: outright acquisition; physical restraint coupled with the frustration of investment-backed profit; and physical invasion.

1. Acquisition

The Subsidence Act provides that owners of private surface structures may require mine owners to leave support coal beneath their properties. Private owners must provide just compensation to the miners. (52 Pa. Cons. Stat. Ann., § 1406.15). The Act thus gives surface owners the power to effect a forced sale of the support coal, just as effectively as if the state had decreed the signing of a bill of sale.^{1,2}

1. Not only is this an indefensible violation of the contracts clause, but the provision has major independent significance with respect to the "takings" clause.

2. *Amici* note the inconsistency between the statements of purported need set forth in the state's policy statements and the failure to require all structures to be supported on a mandatory, non-elective basis.

But with respect to support coal beneath public surface structures, the identical result obtains, not by election of the owners of the public structures but by statutory order, except, of course, that with respect to this property the state exempts itself from paying. The order is more than a mere direction not to use. The statute, in requiring that support coal be left and in assigning liability where insufficient amounts are left, spells out legal duties to affirmatively and physically provide support.

The state under the Subsidence Act has acquired the equitable and operational ownership of private property. It must pay for it.

2. Physical Restraint

At least twice in recent years, this Court has indicated that a "taking" would occur where there was a physical restriction which interfered with an investment-backed expectation. [*Andrus v. Allard*, 444 U.S. 51, 66 n. 22 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). See also, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)].

Both criteria are present in this case. Petitioners have been deprived of a profit opportunity. They have been and will be forced to leave approximately 30 million tons of coal in their mines (C.A. App. 99a-132a). Other coal operators, including members of TSCOA, have been and will be forced to leave millions of additional tons. They cannot use or sell this coal, formerly private property, for a profit.

The second criterion also obtains. Petitioners and all other coal operators are physically restrained from removing as much as 50% of their coal. The Subsidence Act proscribes the removal.

Reliance below by the respondents on *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), is misplaced. *Hodel* involved surface

mining. The instant case involves sub-surface mining. *Hodel* found no facial violation in principal part because the surface land might well have had alternate economic value. Here the sub-surface coal's only value is in its mining. (*Mahon*, 260 U.S., at 414).

3. Invasion

Under the Act, the miner's private assets are converted into public assets to be forever affirmatively and physically employed in the production of public profit.

In the view of *amici*, that conversion of operational ownership, coupled with certain duties of the miner and rights of the state under the Act results, and potentially results, in physical invasion of the miner's property in at least three ways:

(a) Post-Subsidence Act, when a miner enters the mine he will do so in two roles, *viz.*, as miner of his remaining assets and as agent of the state with respect to the public's assets to be employed in support of surface structures;

(b) having converted private assets to public assets, the state reserves to itself the right to go into the private mine for purposes of inspection of the public assets and its agent's compliance with the Act;

(c) for purposes of inspection, the state will employ measuring equipment and, if less than the required amount of support coal has been left, the state may order the use of artificial roof supports within the miner's own mine.

[*Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)].

E. Review to clarify "takings" confusion

Confusion surrounds "takings" jurisprudence. [*Kaiser Aetna*, *Supra*; *Penn Central*, *Supra*; 57 So. Cal. L.

Rev. 561 (1984)].³

This Court has noted probable jurisdiction in *MacDonald, Sommer & Frates v. County of Yolo* (No. 84-2015) to help clarify the confusion which exists in "takings" jurisprudence. It is submitted that to further clarify the confusion caused by the Court of Appeals' interpretation of *Mahon*, this Court should hear this case in an exercise of judicial economy.

Moreover, it would be ironic if this Court heard *Yolo*, but did not hear the instant case when the Justice Department, in urging this Court to hear *Yolo*, relied heavily on *Mahon* for the proposition that a regulatory restriction on the use of property is a "taking". Those directly affected by *Mahon's* emasculation in this case should be heard by this Court.

The confusion is underscored by comparing this Court's decision in *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) and *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). Both cases involved restraints on the operation of mines. In *Pewee* the Government physically took possession of and operated coal mines, whereas in *Central Eureka* the Government issued a regulation which prohibited the operation of gold mines. This Court found that there was a "taking" in *Pewee* but no "taking" in *Central Eureka*. As Justice Harlan said in his dissent in *Central Eureka*: "In these

3. One commentator attributes confusion to *Mahon*. (57 So. Cal. L. Rev. 561, 562).

Because Subsidence and Kohler are operationally identical, no confusion should exist with respect to *Mahon's* application to this case.

This Court should grant review: (a) because it has already noted probable jurisdiction in *Yolo* (see text); (b) to take advantage of the opportunity to clarify whatever confusion surrounds *Mahon* in contexts other than those presented by *Yolo*; and, most importantly, (c) because failure to review the decision in the instant case in the light of *Mahon* will only add to the confusion in exponential proportions.

circumstances making the respondent's right to compensation turn on whether the Government took the ceremonial step of planting the American flag on the mining premises . . . is surely to permit technicalities of form to dictate consequences of substance." (357 U.S., at 181).

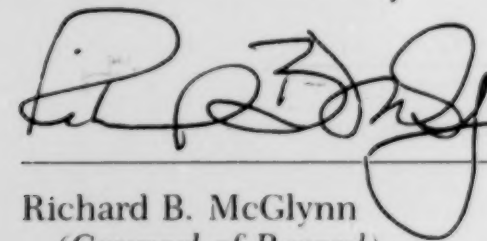
This confusion has now been further underscored by the decision of the United States Court of Appeals for the Third Circuit in its decision below. Despite the fact that the Acts involved in the two cases, the Kohler Act in *Mahon* and the Subsidence Act in this case, are operationally identical, as described above, the Third Circuit nevertheless concluded that the Subsidence Act was constitutional, whereas this Court concluded in *Mahon* that the Kohler Act was unconstitutional. This Court should take this opportunity to clear up the confusion, particularly in a setting where one Act that deprives coal operators of the right to mine a substantial percentage of their coal is declared unconstitutional and a second Act, where the coal operators are likewise deprived of mining a substantial percentage of their coal, is declared constitutional.

To allow the decision below to stand can only magnify the confusion surrounding "takings" jurisprudence.

CONCLUSION

For the foregoing reasons *amici* urge this Court to grant the petition for *certiorari*.

Respectfully submitted,



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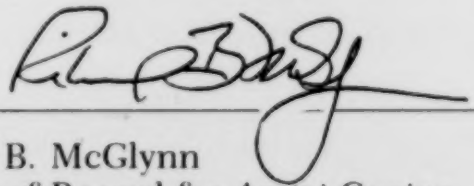
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I, Richard B. McGlynn, Counsel of Record for *amici curiae* Mid-Atlantic Legal Foundation, *et al.*, certify that on the 24th day of February, 1986, I caused to be served three (3) copies of the attached motion and brief on the following:

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February 24, 1986

AMICUS CURIAE

BRIEF

FEB 22 1986

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

KEYSTONE BITUMINOUS COAL ASSOCIATION, HELVETIA COAL
COMPANY, ROCHESTER & PITTSBURGH COAL COMPANY,
U.S. STEEL MINING CO., INC., UNITED STATES STEEL
CORPORATION and CONSOLIDATION COAL COMPANY,

Petitioners,

v.

PETER S. DUNCAN, PHILIP ZULLO
and THOMAS B. ALEXANDER,

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL COAL ASSOCIATION,
THE AMERICAN MINING CONGRESS AND
THE MINING AND RECLAMATION COUNCIL
AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. _____

KEYSTONE BITUMINOUS COAL ASSOCIATION, HELVETIA COAL
COMPANY, ROCHESTER & PITTSBURGH COAL COMPANY,
U.S. STEEL MINING CO., INC., UNITED STATES STEEL
CORPORATION and CONSOLIDATION COAL COMPANY,

Petitioners,

v.

PETER S. DUNCAN, PHILIP ZULLO
and THOMAS B. ALEXANDER,

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On Petition for a Writ of Certiorari to the United States
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BRIEF OF THE NATIONAL COAL ASSOCIATION,
THE AMERICAN MINING CONGRESS AND
THE MINING AND RECLAMATION COUNCIL
AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTERESTS OF THE AMICI CURIAE

The National Coal Association is a non-profit trade association representing coal mining companies which own or operate more than 50% of the Nation's coal producing capacity. The American Mining Congress is a nonprofit association comprised of mining companies

which produce a major proportion of the nation's minerals, including coal, metals, and non-metallic industrial and agricultural minerals. The Mining and Reclamation Council is a nonprofit association of coal producers and state coal associations of all sizes throughout the United States whose primary function is to assist its members in public issues surrounding surface coal mining. The basic purpose of *amici* is to represent the interests of the mining industry and to cooperate with public authorities in dealing with problems that affect mining.

Pursuant to Rule 36 of the Rules of this Court the parties to this case have by letters consented to the filing of this brief. Copies of their letters of consent have been filed with the Clerk of this Court.

**THE QUESTIONS PRESENTED IN THE PETITION
ARE OF GREAT IMPORTANCE TO THE MINING
INDUSTRY OF THE UNITED STATES**

Although this case involves only a Pennsylvania statute regulating coal mine subsidence,¹ it nonetheless has important national implications. The Court of Appeals has clearly departed from and indeed virtually emasculated this Court's landmark decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In addition, the Court of Appeals completely ignored this Court's two leading precedents interpreting the Contract Clause of the United States Constitution in cases involving private contracts, *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934); *Allied Structure Steel Co. v. Spannaus*, 438 U.S. 234 (1978). Accordingly, the Court of Appeals decision raises very serious questions concerning whether the coal industry in the United States can develop its reserve base and whether this development can take place in a manner consistent with conservation of the

¹ Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, 52 Pa. Cons. Stat. Ann. § 1406.1 (Purdon Supp. 1984-1985).

Nation's coal resources. The reserve base of the coal industry throughout the nation was acquired in essentially the same manner as in Pennsylvania and the decision of the Third Circuit thus directly jeopardizes the property and contract rights of all of *amici*'s members.

Since 1922, this Court's holding in *Pennsylvania Coal* has existed as a precedent for the propositions that the ownership of coal "consists in the right to mine it," 260 U.S. at 414, quoting, *Com. Ex rel. Keator v. Clearview Coal Co.*, 256 Pa. 328, 331, 100 Atl. 820 (1917), and that "to make it commercially impractical to mine certain coal has nearly the same effect for constitutional purposes as appropriating or destroying it," 260 U.S. at 414. The final sentence of this Court's opinion is perhaps of most significance to this case:

So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

260 U.S. at 416.

That parties who acquired surface rights at reduced costs reflecting the severance of the mineral and support rights or who profited from the sale of these property or contract rights can band together to form a political coalition to defeat the rights of the mineral owner is the type of abuse of the legislative process that both the Just Compensation Clause of the Fifth Amendment and the Contract Clause of Article I, Section 10 were intended to prevent. As pointed out by the Court in *Pennsylvania Coal*:

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so shortsighted as to acquire only surface rights, without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way

in the first place, and refusing to pay for it because the public wanted it very much.

This case is factually indistinguishable from but has been decided differently than *Pennsylvania Coal*, which over 60 years ago established the "outer limits" of the government's power to regulate the use of severed mineral estates. *Pennsylvania Coal* involved the Kohler Act, an earlier Pennsylvania statute which, in substance and effect, is identical to the one challenged now in this case. In *Pennsylvania Coal*, Justice Holmes speaking for the Court stated:

[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

260 U.S. at 416 (emphasis added).

The issues involved here have broad implications for the coal mining industry as a whole. From the standpoint of the industry it is important that the Court provide answers to the questions of whether and to what extent a state may, under environmental regulations, dictate to owners of severed subsurface mineral estates the manner and percentage of mineral extraction in the face of long-standing private arrangements under which different results were contemplated and, under state law, sanctioned.²

The nation's coal industry needs to know the limit of government's power to alter legal relationships upon which the industry is founded and whether the general public or individual members of the industry must bear the expense of achieving legislatively perceived public purposes.

² As implemented by the Commonwealth of Pennsylvania, the state statute and regulations challenged in this case require underground mine operators, despite private contracts to the contrary, to abandon at least 50% of the coal in their underground mines beneath a wide variety of surface structures and features. See 52 Pa. Cons. Stat. Ann. § 1406.4; 25 Pa. Code § 89.145.

The Court of Appeals' holding in this case casts a long shadow on *Pennsylvania Coal* and clouds the future of modern full extraction mining methods in the United States.

1. The Entire Legal Foundation Upon Which Underground Coal Mining Operations Have Been Based And Are Being Planned Has Been Called Into Question.

For well over a hundred years underground coal mining in Pennsylvania, and in other coal producing states, has been carried on in accordance with well recognized principles of common law which permitted, and indeed affirmatively sanctioned, the removal of all the economically recoverable coal from a given tract of land if the owner of the coal had purchased the right to do so under state law.³ Indeed, in the circumstances present here where a waiver of the right to surface support has been purchased, this Court and others have recognized that a severed subsurface mineral estate is dominant over the surface estate. *Pennsylvania Coal*; *Kinney Coastal Oil Co. v. Kieffer*, 277 U.S. 488 (1928); *Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878 (10th Cir. 1974), cert. denied, 419 U.S. 1097 (1975); *Babcock Lumber Co. v. Faust*, 156 Pa. Super. Ct. 19, 39 A.2d 298 (1944).

Legal relationships between surface owners and owners of severed mineral estates and legal aspects of mine subsidence have traditionally been governed by state law with limited government regulation.⁴ In most states per-

³ See Ingram, *Regulation of Mine Subsidence—Legal Issues Raised by Government Intervention in Historically Private Arrangements*, 5 Eastern Min. L. Inst. 6.01 [4] (1984); 6 American Law of Mining § 203.02 (2d Ed. 1985).

⁴ Pennsylvania was an obvious exception to the general pattern of limited state regulation. See 52 Pa. Cons. Stat. Ann. § 1406.1, et seq. Several western states also had statutes dealing with subsidence damage but these statutes merely required operators

missible methods and percentages of coal extraction and the extent to which underground mine operators were required to restore or compensate for subsidence damage were determined in the first instance in private arrangements based upon severance deeds or other agreements. These negotiated arrangements were modified only by traditional common law doctrines of nuisance, negligence or eminent domain. While the resolution of issues arising from mine subsidence damage varied from state to state, the law of each state permitted surface owners to waive or convey away, in whole or in part, the right to have the surface supported and to release underground mine operators from liability for subsidence damage.⁵

In the United States, the common law has long recognized an underground mine operator's right to acquire a waiver of liability from surface owners for mine subsidence damage, including damages to existing structures or structures built after a severance of the surface and mineral estates. These rights have been acquired usually in one of three ways: (1) the owner of the fee severed the mineral estate and for value paid waived or released the right to subjacent support in the deed; (2) the owner of the fee sold the right of surface support to the min-

to post bonds to cover possible damage; they did not purport to limit the amount of coal which could be mined. See 4 American Law of Mining § 21.16, n.14 (1st ed. 1960). In general, the various legislatures of the major coal producing states did not see fit to disturb a system of private risk allocation, vital to the coal industry, which had existed and worked satisfactorily for decades.

⁵ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (discussing Pennsylvania law); *Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S.E. 24 (1905); *Paul v. Island Coal Co.*, 44 Ind. App. 218, 88 N.E. 959 (1909); *Boyer v. Old Ben Coal Corp.*, 229 Ill. App. 56 (1923); *Case v. Elk Horn Coal Corporation*, 210 Ky. 700, 276 S.W. 573 (1925); *Rush v. Sines Bros. & Co.*, 34 Ohio App. 38, 170 N.E. 379 (1929). See also 4 American Law of Mining § 21.14; 6 American Law of Mining § 203.02[1].

eral owner; or (3) the mineral owner purchased a waiver or release of surface support from the surface owner sometime after purchasing the mineral estate. Generally, the waiver or release, whenever acquired, is construed as running with the land and binds the subsequent owners of the surface.

The common law clearly established the rights of the owners of the surface and subsurface mineral estates. All parties knew or could have learned whether or not the owner of the mineral estate could mine all of the mineral and whether the mine operator was responsible for subsidence damage to the surface by routine title examination.

Billions of tons of coal reserves were acquired by the nation's coal industry under the legal patterns described above and expressly recognized and sanctioned in *Pennsylvania Coal*. Huge capital investments were made and essential planning was carried out in reliance on the expectation that these coal reserves could be mined by use of full extraction mining methods. The holding of the Court of Appeals here suggests that, contrary to what this Court said in *Pennsylvania Coal*, government now can drastically limit the method and percentage of contemplated coal recovery and alter privately negotiated outcomes.

2. The Nation's Coal Operators Conduct Operations In Many States And A Certain Pattern Of Regulation No Longer Exists Which Impairs Amici's Ability To Conduct Business.

The Federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1201 *et seq.* was passed on August 3, 1977.⁶ At that time, Congress was

⁶ SMCRA was enacted to insure that underground coal mining would be subject to relatively uniform minimum levels of regulation throughout the nation. 30 U.S.C. § 1266. SMCRA is a classic federal "carrot and stick" regulatory statute. The "stick" is contained in 30 U.S.C. § 1254(a) which provides that unless a state submits a program of laws "in accordance with" SMCRA and a program of

well aware of the common law property rights recognized by this Court in *Pennsylvania Coal* and enacted provisions consistent with the ownership of the mineral and support rights by specifically exempting operators utilizing full extraction mining resulting in planned and controlled subsidence from the requirement to adopt subsidence prevention measures.⁷ Section 516 of SMCRA, 30 U.S.C. § 1266. In all other instances, operators were to be required to use the best technology to minimize material damage to the surface.

Sections 516(b)(1) and (c) of SMCRA are the only provisions directly dealing with coal mine subsidence.⁸

regulations "consistent with" those promulgated by the Federal Office of Surface Mining ("OSM"), the federal government will assume primary jurisdiction over the regulation of the surface effects of underground coal mining. The "carrot" is contained in other provisions of SMCRA which provide substantial federal financial assistance to states which elect to retain exclusive jurisdiction over the regulation of underground coal mining by submitting approved primary programs. See, e.g., 30 U.S.C. § 1231-1243 and 30 U.S.C. § 1295.

⁷ It is significant that a leading sponsor of SMCRA specifically recognized the precedent of *Pennsylvania Coal* and the constraints of the Fifth Amendment and cautioned that Congress could not go too far in regulating property and contract rights when considering amendments to SMCRA. See 123 Cong. Rec. H3827 (daily ed. Apr. 29, 1977) (remarks of Rep. Udall).

⁸ Section 516 provides in pertinent part:

(b) Each permit issued under any approved State or Federal program pursuant to this Chapter and relating to underground coal mining shall require the operator to—

(1) adopt measures consistent with known technology in order to prevent subsidence causing *material damage to the extent technologically and economically feasible*, maximize mine stability, and maintain the value and reasonably foreseeable use of such surface lands, *except in those instances where the mining technology used required planned subsidence in a predictable and controlled manner: provided that nothing in this subsection shall be construed*

But in those provisions Congress did not intend the mine subsidence provisions of SMCRA to alter preexisting property and contract rights or to effect takings.

Initial regulations by the Office of Surface Mining ("OSM") created an elaborate and unauthorized federal regulatory program⁹ which, had it been fully implemented, would have prevented the Nation's underground mine operators from exercising their common law rights to mine all of their coal. 44 Fed. Reg. 15422 (1979). In apparent recognition of the precedent of *Pennsylvania Coal*, OSM's initial regulations were modified in June of 1983 to require underground mine operators to repair damage to structures or to compensate the owner for such damage resulting from subsidence, only "[t]o the extent required by state law." 48 Fed. Reg. 24652 (1983).

However, these regulations recently have been remanded to OSM on APA notice and comment grounds for further public comment and presently are under consideration by the agency. 50 Fed. Reg. 27910, 27911 (1985). Nevertheless, until the decision of the Court of Appeals in this case, *amici* submit that all affected parties correctly as—

to prohibit the standard method of room and pillar mining; . . . (Emphasis supplied.)

(c) In order to protect the stability of the land, the regulatory authority shall suspend underground coal mining under urbanized areas, cities, towns, and communities and adjacent to industrial or commercial buildings, major impoundments, or permanent streams if he [sic] finds imminent danger to inhabitants of the urbanized areas, cities, towns, and communities.

⁹ OSM's initial regulations not only ignored the express language of Section 516(b)(1) which exempts mining technologies requiring the use of planned and predictable subsidence from the prevention of subsidence requirement; they also ignored Congress' finding of a need to insure an expanding and economically healthy underground coal mining industry, 30 U.S.C. § 1201(b), and one of its purposes for enacting SMCRA, namely, "to encourage the full utilization of coal resources through the development and application of underground extraction technologies." 30 U.S.C. § 1201(k).

sumed that *Pennsylvania Coal* was controlling rule in this area of the law. In light of the decision below, however, no coal operator can predict with certainty what the relevant standards will be for judging the limit of state regulation.¹⁰

The long shadow cast by the Court of Appeals on *Pennsylvania Coal* has created confusion and uncertainty among coal operators who conduct business not only in Pennsylvania but in states within the jurisdiction of other Courts of Appeals. The relative certainty of regulation which had existed from state to state and permitted centralized planning and development for multi-state mine operators no longer exists.

The Court is now presented with a unique and compelling opportunity to clarify its takings jurisprudence in the context of a governmental action affecting severed mineral estates and coal mining identical to that involved in *Pennsylvania Coal*. The *amici* believe that the potential uncertainty and confusion created by the Court of Appeals in this case must be addressed. The coal industry needs to plan the development of its reserve base without the threat that development consistent with the conservation of coal resources could be denied.

¹⁰ The *amici* and their members have also relied upon *Pennsylvania Coal* in the context of other aspects of SMCRA's regulatory program. Under Section 522 of SMCRA, 30 U.S.C. § 1272, Congress prescribed an elaborate procedure to designate certain lands unsuitable for surface coal mining operations but was careful to make any designation of unsuitability subject to the valid existing rights of the owner of the mineral estate. After reflection, OSM elected to adopt a traditional analysis and employed a "takings test," exempting from the prohibitions of Section 522 property interests in circumstances where the application of the prohibitions would effect a taking of property entitling the person to constitutionally mandated compensation. 46 Fed. Reg. 41348 (1983). OSM's regulation embodying the "takings test" has also been remanded on APA notice and comment grounds and is again under consideration by the agency. See *In Re Permanent Surface Mining Regulation Litigation*, 22 E.R.C. 1557 (D.D.C. 1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 24, 1985

JOINT APPENDIX

No. 85-1092

FILED

MAY 23 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Petitioners,

v.

PETER S. DUNCAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States
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JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

Date	No.	Proceedings
1982		
12/16	1	Complaint Filed.
12/16	2	Motion for Special Appointment to Serve process and order of Court entered by the Clerk appointing Ralph Passant to serve the Summons and Complaint upon the defendants.
12/16	—	Summons Issued.
12/17	—	Case reassigned to Judge McCune.
12/20	3	Amended motion for special appointment to serve process and order of Court entered by the Clerk appointing Kevin McKeon to serve the summons and complaint upon the Defendants Peter Duncan and Philip Zullo.
12/22	4	Affidavit of Service pursuant to FRCP local rule 6 on Defendants Peter S. Duncan and on Philip Zullo on December 20, 1982 of the Complaint and Summons.
1983		
1/5	5	Return of Service of Summons and Complaint on Thomas B. Alexander on 12/21/82 filed.
1/6	6	Order entered returning case to Clerk for re-assignment (McCune, J.)
1/6		Card pulled, case assigned Ziegler, J.
1/11	7	Motion to Dismiss filed by the Defendants.
1/14	8	Hearing held on Status Conf before Judge Ziegler, memo filed (Rep. None).
6/1	9	Plaintiffs' Motion for Preliminary Injunction filed by Plaintiffs with a proposed order.
6/1	w/9	Order of court entered June 1, 1983 directing that a hearing on the Plaintiff mining company

Date	No.	Proceedings
1983		
		motion for Preliminary Injunction shall be June 20, 1983 at 2:00 P.M. before Judge Ziegler (Ziegler, J.).
6/24	10	Sitpulation filed and order of Court entered June 21, 1983 approving that Plaintiffs withdraw their pending motion for a Preliminary Injunction without prejudice (Ziegler, J.).
9/30	11	Plaintiffs' motion for preliminary injunction filed with proposed order thereon.
9/30	12	Plaintiffs' motion for leave to file amended complaint filed.
9/30	13	Affidavit of Thomas J. Usher and William G. Regel filed.
10/11 w/11		Order of Court entered October 11, 1983 directing that Plaintiffs' Motion for a Preliminary Injunction is set for October 17, 1983 at 10:00 A.M. (Ziegler, J.).
10/13	14	Defendants' Response to Motion for Preliminary Injunction filed.
10/17	15	Motion to Dismiss Amended Complaint filed by the Defendants.
10/17	16	Order of Court entered October 17, 1983 directing that the parties shall be given 30 days from this date to complete discovery, and it is ordered that Plaintiffs shall submit to defendants within 30 days all documents which shall be offered at trial, and the Plaintiff shall submit to the Defendants within 30 days a written summary in support of Plaintiffs' contention concerning harm, and that the parties shall file a stipulation of agreed facts on or before November 15, 1983 and the Parties shall file a stipulation, and that the parties shall file briefs in support of their positions on or before November 15, 1983 and it is further ordered

Date	No.	Proceedings
1983		
		a hearing shall be held on December 1, 1983 at 10:00 A.M. (Ziegler, J.).
10/18 w/12		Order of Court entered October 18, 1983 directing that Plaintiffs' Motion for Leave to File and Amended Complaint is Granted (Ziegler, J.).
10/25	17	First Interrogatories to Plaintiffs filed.
11/4	18	Notice of Deposition will be taken of the Plaintiff on November 9 and 10, 1983 at 10:00 A.M. filed.
11/8	19	Notice of Deposition will be taken of Thomas B. Alexander on November 9 and 10, 1983 filed.
11/15	20	Motion Requesting Modification of Order dated October 17, 1983 and Order of Court entered November 15, 1983 directing that this Court's Order of October 17, 1983 is modified and more fully explained on this pleading, and a hearing is set for December 1, 1983 at 10:00 A.M. before Judge Ziegler (Ziegler, J.).
11/22	21	Stipulation of Counsel filed.
11/22	22	Stipulation of Counsel filed that a hearing on Plaintiffs' Pending Motion for Preliminary Injunctive relief shall not be needed.
11/29	23	Answers to first interrogatories to Plaintiffs filed.
11/29	24	Plaintiffs' Motion for Summary Judgment filed.
11/29	—	Usher Affidavit Exhibit A and B received and given to court room deputy.
11/30	25	Stipulation of Counsel filed.
12/2	26	Deposition of Thomas B. Alexander filed.
12/8	27	Continued Deposition of Hilbert Douglas Dahl filed.
12/8	28	Deposition of Hilbert Douglas Dahl Vol I filed.
12/8	29	Deposition of Thomas R Lloyd filed.

Date	No.	Proceedings
1984		
1/3	30	Defendants' Motion for Partial Summary Judgment filed with a proposed order.
1/3	31	Answer to Amended Complaint of Defendants DeBenedicts, Sullo and Alexander filed.
2/3	32	Notice to counsel of record setting case for Argument on Motion for Summary Judgment on March 9, 1984 at 10:00 A.M. before Judge Ziegler.
2/27	33	Hearing held on Motions for Summary Judgment before Judge Ziegler memo filed (Rep. None) CAV.
2/29	34	Opinion filed and Order of Court entered February 29, 1984 directing that the Motion of Plaintiffs' for Summary Judgment is Denied and it is further ordered that the motion of Defendants for Partial Summary Judgment shall be treated as a Motion for Summary Judgment as to all issues because the parties have addressed all issues on their briefs and as we have noted there are no genuine issues of material fact and it is ordered that the Motion of Defendant for Summary Judgment is Granted (Ziegler, J.)
2/29	—	Pursuant to Opinion filed and Order of Court entered Granting defendants Motion for Summary Judgment the above case is hereby marked Closed.
2/29	—	Notices mailed.
3/12	35	Motion requesting Relief from and Amendment of Judgment filed by the Plaintiffs.
3/13	36	Order of Court entered March 13, 1984 directing that defendants shall file an answer to the Motion of Plaintiffs for relief from Judgment within 10 days (Ziegler, J.).
3/22	37	Response of Defendants to Motion requesting relief from and an amendment of Judgment filed.

Date	No.	Proceedings
1984		
3/28	38	Notice of Appeal filed by the Plaintiffs from the order of February 29, 1984.
3/28	—	Letter and copies of Notice of Appeal mailed to counsel of record, and letter certified copy of notice of appeal mailed to the U.S. Court of Appeals with copy of February 29, 1984 Order. No Court reporter and certified copy of the Docket Sheet.
4/4	39	Order of Court entered April 4, 1984 directing that the Motion of Plaintiffs for Certification of the Judgment of this court dated February 29, 1984 be and hereby is Denied and it is further ordered that the Motion of Plaintiffs requesting relief and an amendment of Judgment be and hereby is granted to the extent that the parties shall be granted 90 days within which to pursue discovery limited to the question whether the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act and the relevant regulations constitute a constitutionally infirm taking of investment backed expectations in their property, it is ordered that the Parties shall comply with Local Rule 5 II and this case be scheduled for trial on July 23, 1984 at 10:00 A.M. (Ziegler, J.).
4/4	—	Pursuant to Order of Court entered, the above case is hereby marked re-opened.
4/5	—	Notice received from the U.S. Court of Appeals advising that the above case was Docketed at (84-3184).
4/16	40	Defendants Alternative Motion to Decide Issues remaining in Defendants Motion for partial Summary Judgment and Joint Motion to Adjust Discovery and trial date accordingly filed with a proposed order.

Date	No.	Proceedings
1984		
4/16	41	Joint Motion for Reconsideration of Denial of Prior Separate Requests for Certification filed with a proposed order.
4/23	w/41	Order of Court entered April 23, 1984 directing that upon consideration of the parties' joint motion filed pursuant to 28 U.S.C. 1292(b) to certify questions as immediately appealable, it is ordered that said Motion is Granted, and the Court concludes the immediate appeal may materially advance the ultimate termination of this litigation because until the facial validity of the challenged provisions is finally determined the extent to which the above provisions actually frustrate plaintiffs investment back expectations cannot be easily determined and it is further ordered that all other proceedings in the District Court be and hereby are stayed (Ziegler, J.).
5/2	—	Pursuant to phone call from the circuit copy of Document #39 and #41 together with CC copy of Docket Sheet, forwarded to the U.S. Court of Appeals.
5/14	42	Praeipie for withdrawal of Appearance of Attorney Robert B. Hoffman, Esq. and enter appearance of Attorney Andrew S. Gordon, Esq. as counsel for the Defendants.
6/8	—	Certified copy of Order dated June 6, 1984 received from the U.S. Court of Appeal directing that submitted by the Clerk for possible dismissal due to jurisdiction for the reason that the notice of appeal is premature, and joint response to jurisdictional defect and the foregoing motion is Granted (Gibbons, J.).
6/8	—	Certified copy of Order received from the U.S. Court of Appeals dated June 6, 1984 directing that Joint Application requesting Certification of

Date	No.	Proceedings
1984		
		Questions as appealable pursuant to 28 U.S.C. 1292(b) and the foregoing Motion is Granted (Gibbons, J.).
6/14	—	Filing Fee of \$70.00 paid by the Plaintiff Keystone Bituminous Coal Association et al.
6/14	—	Pursuant to appeal and fees paid, Notice of Appeal under 1292(b) filed. Information Sheet, carbon copy of docket entries and copy of April 4, 1984 order and April 23, 1984 order mailed to U.S. Court of Appeals, and copy of Information Sheet to Judge Zeigler and Defendants. No Court Reporter.
6/14	—	Transcript purchase order mailed to counsel for the Plaintiffs.
6/27	43	Transcript purchase order filed by the Appellant and indicating that a Transcript not needed for the appeal and also filed a Statement of the Issues.
6/26	—	The above case is complete for purpose of appeal, and three copies of the Docket Sheet mailed to the U.S. Court of Appeals, one Certified.
7/2	—	Receipt received from the U.S. Court of Appeals of the Certified list in lieu of record.
7/2	—	Notice received from the U.S. Court of Appeals that the above case was docketed at (84-3406).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
v. *Plaintiffs*,
NICHOLAS DEBENEDICTIS, *et al.*,
Defendants.

ORDER

AND NOW, this 23rd day of April, 1984, upon consideration of the parties' joint motion, filed pursuant to 28 USC § 1292(b), to certify questions as immediately appealable, it is ORDERED that said Motion is granted and the Court does hereby certify as appealable the following questions:

Whether Sections 4, 6 and 15 of the Bituminous Mine Subsidence and Land Conservation Act and Sections 89.145, 89.146 and 89.147(b) of 25 Pa. Code,

1. Violate the Rule of the *Mahon* Decision
2. Constitute *Per Se* Takings,
3. Violate Article I § 10 of the Constitution of the United States.

The Court concludes that there is a substantial ground for a difference of opinion as to whether the above cited sections of Pennsylvania law are constitutional because a prior law dealing with the same subject matter was invalidated as unconstitutional in *Pennsylvania Coal Company v. Mahon*.

The Court further concludes that an immediate appeal may materially advance the ultimate termination of this litigation because until the facial validity of the challenged provisions is finally determined, the extent to which the above provisions actually frustrate plaintiffs' investment backed expectations cannot be easily determined.

It Is Further Ordered that all other proceedings in the district court be and hereby are stayed.

/s/ Donald E. Ziegler
District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

(C.A. No. 82-2712)

KEYSTONE BITUMINOUS COAL ASSOCIATION, a Pennsylvania unincorporated association of bituminous coal producers, individually and as represented by certain of its member companies; HELVETIA COAL COMPANY, a Pennsylvania corporation; ROCHESTER & PITTSBURGH COAL COMPANY, a Pennsylvania corporation; U.S. STEEL MINING CO., INC., a Delaware corporation, individually and as a trustee *ad litem* for KEYSTONE BITUMINOUS COAL ASSOCIATION; UNITED STATES STEEL CORPORATION, a Delaware corporation; and CONSOLIDATION COAL COMPANY, a Delaware corporation,

Plaintiffs,

v.

NICHOLAS DEBENEDICTIS, individually and in his capacity as Secretary of the Commonwealth of Pennsylvania, Department of Environmental Resources; PHILIP ZULLO, individually and in his capacity as Chief, Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources; and THOMAS B. ALEXANDER, individually and in his capacity as Chief, Section of Mine Subsidence Regulation of the Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources,

Defendants.

JOINT APPLICATION TO CERTIFY QUESTIONS
AS IMMEDIATELY APPEALABLE

The parties above named by the counsel hereby file the following Joint Application To Certify Questions As Immediately Appealable and in support thereof state:

1. In their complaint, plaintiffs challenge the constitutionality of certain state statutes and regulations. Plaintiffs allege these provisions require underground coal operators to leave up to 50% of their coal unmined beneath specified structures and features without compensation; and, in certain cases, also require underground coal operators to repair or restore subsidence damage caused by their mining even though they had acquired releases or waivers of liability. The plaintiffs also challenge a state statute which requires underground coal operators to sell a part of their coal to certain private surface owners.

2. Plaintiffs first argue that these provisions are unconstitutional, either facially or as applied in individual instances because, in plaintiff's view, they destroy previously existing property and contract rights. In the alternative, plaintiffs argue that if these provisions are found to be constitutional, either facially or as applied in individual instances, the cumulative impact of these provisions upon plaintiffs' investment backed expectations results in a *de facto* unconstitutional taking of their property.

3. Following limited discovery, the plaintiffs filed a motion for partial summary judgment on their claim that these provisions were either unconstitutional on their face or as applied in individual instances. The defendants filed a cross-motion for partial summary judgment. Neither motion sought a determination of plaintiffs' alternative *de facto* claims.

4. By Order and accompanying Judgment dated February 29, 1984, the United States District Court for the Western District of Pennsylvania granted to the defendants, not a partial summary judgment, but a judgment which had the effect of dismissing plaintiffs' complaint in its entirety.

5. Subsequently, on April 4, 1984, the District court, on plaintiffs' Motion, amended its judgment of February

29, 1984, and set a trial date to near evidence on plaintiffs alternative, *de facto* claims.

6. By an Order dated April 23, 1984, the District Court, pursuant to 28 U.S.C. § 1292(b), granted a joint motion filed by the parties and certified as appealable the following questions:

"whether Sections 4, 6 or 15 of the Bituminous Mine Subsidence and Land conservation Act and Sections 89.145, 89.146 and 89.147(b) of 25 Pa Code,

1. Violate the Rule of the *Mahon* Decision
2. Constitute *Per se* Takings,
3. Violate Article I § 10 of the Constitution of the United States."

A copy of the Joint Motion and District Court's Order is attached hereto as Exhibits "A" and "B", respectively.

7. The District Court certified that an immediate appeal may materially advance the ultimate termination of this litigation because, until the validity of the challenged provisions is finally determined, the issue of whether a *de facto* taking has resulted could not be easily determined.

8. The parties to this litigation submit the District Court's finding that an immediate appeal may materially advance the termination of this matter is further justified because, should there be a full trial on the *de facto* issue only to be followed by an appellate court decision that the challenged provisions are unconstitutional, the considerable time and expense required to try to the *de facto* issue will have been needlessly spent. See paragraph 2 of Exhibit "A", attached hereto. Furthermore, in the event that only some of the challenged provisions are found to be unconstitutional by an appellate court after a full trial on the *de facto* issue, any judgment by the District Court upholding plaintiffs *de facto* claims

might well have to be vacated and remanded to determine whether such a judgment was proper.

9. The District Court also found that there exists a substantial ground for a difference of opinion as to whether the challenged provisions are constitutional, because a prior law dealing with the same subject matter was invalidated as unconstitutional in *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). The parties submit that this conclusion is also justified. While the defendants support the District Court's judgment that the challenged provisions are constitutional, they nevertheless concur with plaintiffs' view that this question will ultimately be decided by the appellate courts' construction of the applicability of certain decisions of the Supreme Court of the United States to those facts so far developed.

11. The parties to this litigation further submit that the questions which have been certified are important questions which need to be expeditiously resolved. Resolution of this action and the certified questions will likely have a significant impact upon underground mining and the extent to which coal will be deep mined and underground coal mining will be regulated.

Respectfully submitted,

ROSE, SCHMIDT, DIXON
& HASLEY

By /s/ Richard DiSalle
RICHARD DISALLE

By /s/ Henry Ingram
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By /s/ Thomas C. Reed
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By /s/ Robert B. Hoffman
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 Appellees

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Plaintiffs,

v.

NICHOLAS DEBENEDICTIS, *et al.*,
Defendants.

**JOINT MOTION FOR RECONSIDERATION OF
 DENIAL OF PRIOR SEPARATE REQUESTS
 FOR CERTIFICATION**

The above parties, by their respective counsel, hereby jointly move this Honorable Court pursuant to 28 U.S.C. § 1292(b) to reconsider its decision to deny certification of those questions already decided and in support thereof state as follows:

1. Following this Court's April 4, 1984 Order, substantial questions nevertheless remain undecided in this case. These include whether the statutes and regulations found by this Court to be constitutional, either on their face or as applied in individual instances, are nevertheless unconstitutional when their cumulative impact upon plaintiffs' operations is considered.

2. Both parties agree, and respectfully submit, that the resolution of these questions will involve complex and voluminous proofs. For example, the plaintiffs currently operate 13 mines which, to varying degrees, have been directly affected by each of the challenged provisions. Consequently, plaintiffs will likely be required to first offer proofs relating to the nature of their investment backed expectations for several mines. Mine by mine

proofs will probably be necessary because the dedication of capital investment to each mine was based upon, among other things, time and site specific considerations such as market and labor conditions, the type and quality of coal (*e.g.*, metallurgical, steam or industrial) to be mined and the rates of return available on the capital at the time or times it was invested in a particular project.

In turn, defendants will likely be required to offer proofs of a similar nature. Furthermore, because the cumulative effect of the application of each challenged provision may be dependent upon, among other things, site specific geology, mining techniques as well as the location and concentration of protected structures and features, plaintiffs and defendants will likely be required to offer several completely different sets of proofs on the extent to which the plaintiffs' investment backed expectations have been or have not been destroyed. To develop these proofs will require both parties to retain experts trained in a variety of disciplines and the cost in time and money will be significant. In addition, the parties believe the trial time necessary to permit a full development of such proofs will be very substantial.

3. While the defendants believe this Court's judgment that the challenged provisions were constitutional *per se* was correct they nevertheless concur with plaintiffs' view that this question will ultimately be controlled by how the federal appellate courts construe the applicability of certain decisions of the Supreme Court of the United States to those facts so far developed. Furthermore, should an appellate court disagree with this Court's February judgment *in toto* then the time and money involved offering proofs and resolving disputed facts relating to *de facto* constitutionality will have been needlessly spent.

4. In addition, if an appellate court disagree with this Court's February decision in part but concurs with the view that the *de facto* claim is nevertheless viable, the

parties believe that a remand for new findings on the *de facto* issue may well be necessary. The reason for this belief is that neither party is currently in a position to properly present proofs relating to the overall impact of the challenged provisions until it is first finally determined what provisions are *per se* valid. If one of the provisions is not properly applied, then the impact which the other provisions have upon the plaintiffs' investment backed expectations is directly affected.

5. In their initial post-judgment motion, the plaintiffs requested this court to modify its judgment *and* to certify those portions left unmodified. They did not request a modification without an accompanying certification, the relief granted by this Court. The sole reason why plaintiffs filed their post-trial motion was to limit the issues which would be before the Court of Appeals for the Third Circuit. They did not wish to delay appellate review.

6. In their reply to plaintiffs' initial post-judgment motion the defendants also requested this Court to certify those portions of the Court's February judgment which were not modified.

WHEREFORE, the parties respectfully request this Court to reconsider its decision not to certify as immediately appealable the issues already decided.

Respectfully submitted,

ROSE, SCHMIDT, DIXON
& HASLEY

By /s/ _____
RICHARD DiSALLE

By /s/ Henry McC. Ingram
HENRY MCC. INGRAM

By /s/ Thomas C. Reed
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 ATTORNEY GENERAL

By /s/ Robert B. Hoffman
 ROBERT B. HOFFMAN
 Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(C.A. No. 82-2712)

KEYSTONE BITUMINOUS COAL ASSOCIATION, a Pennsylvania unincorporated association of bituminous coal producers, individually and as represented by certain of its member companies; HELVETIA COAL COMPANY, a Pennsylvania corporation; ROCHESTER & PITTSBURGH COAL COMPANY, a Pennsylvania corporation; U.S. STEEL MINING CO., INC., a Delaware corporation, individually and as a trustee *ad litem* for KEYSTONE BITUMINOUS COAL ASSOCIATION; UNITED STATES STEEL CORPORATION, a Delaware corporation; and CONSOLIDATION COAL COMPANY, a Delaware corporation,
Plaintiffs,

v.

NICHOLAS DEBENEDICTIS, individually and in his capacity as Secretary of the Commonwealth of Pennsylvania, Department of Environmental Resources; PHILIP ZULLO, individually and in his capacity as Chief, Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources; and THOMAS B. ALEXANDER, individually and in his capacity as Chief, Section of Mine Subsidence Regulation of the Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources,
Defendants.

AMENDED COMPLAINT

Introduction

This is a civil rights action which seeks to have declared unlawful and enjoined certain provisions of Penn-

sylvania's Bituminous Mine Subsidence and Land Conservation Act ("Subsidence Act"), Act of April 27, 1966, P.L. 31, Spec. Sess. No. 1, *as amended*, October 10, 1980, P.L. 874, No. 156, 52 P.S. § 1406.1 *et seq.* (Supp. 1982) and certain regulations which purport to implement the Subsidence Act ("Subsidence Control Program") on the grounds that the challenged provisions deprive plaintiffs of rights guaranteed them by the Constitution of the United States.

Jurisdiction

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1331, the amounts in controversy exceeding the sum or value of \$10,000, exclusive of interest and costs.

Venue

2. This Court has venue over this action pursuant to 28 U.S.C. § 1391 and 28 U.S.C. § 1392, claims having arisen in this district and one of the defendants being a resident of this district.

Parties

3. Plaintiff, Keystone Bituminous Coal Association ("KBCA"), is a Pennsylvania unincorporated, non-profit association with its principal office in Dauphin County, Pennsylvania, whose members are corporations and partnerships engaged in the mining of bituminous coal. The members of Keystone produce more than fifty percent of the bituminous coal mined in Pennsylvania and the vast majority of bituminous coal mined by complete extraction underground mining methods. Keystone members also own substantial coal reserves beneath the surface and subsurface properties of others.

4. Plaintiff, Helvetia Coal Company ("Helvetia"), is a Pennsylvania corporation and a wholly-owned subsidiary of plaintiff, Rochester & Pittsburgh Coal Company ("R&P"), which engages in underground coal mining op-

erations in the Western District of Pennsylvania, leases and/or controls substantial coal reserves beneath the surface and subsurface property of others in this District and holds currently valid Subsidence Permits, which will expire in the near future.

5. Plaintiff, R&P, is a Pennsylvania corporation which owns, leases and/or controls substantial coal reserves beneath the surface and subsurface property of others in this District including the coal reserves being mined by Helvetia.

6. Plaintiff, U.S. Steel Mining Co., Inc. ("U.S.S.M."), is a Delaware corporation, a member of Keystone and a wholly-owned subsidiary of plaintiff, United States Steel Corporation ("U.S. Steel"), which engages in underground coal mining operations in the Western District of Pennsylvania, controls substantial coal reserves beneath the surface and subsurface property of others in this District and holds currently valid Subsidence Permits, which will expire in the near future.

7. Plaintiff, U.S. Steel, is a Delaware corporation which owns, leases and/or controls substantial coal reserves beneath the surface and subsurface property of others in this District including the coal reserves being mined by U.S.S.M.

8. Plaintiff, Consolidation Coal Company ("Consol"), is a Delaware corporation which by itself or through affiliates engages in underground coal mining operations in the Western District of Pennsylvania, owns, leases and/or controls substantial coal reserves beneath the surface and subsurface property of others in this District and holds currently valid Subsidence Permits.

9. Defendant, Nicholas DeBenedictis, is Secretary of the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), a resident of the Middle District and the individual responsible for the overall administration and enforcement of the Common-

wealth's programs which regulate bituminous underground coal mining.

10. Defendant Philip Zullo is Chief of DER's Division of Mine Subsidence, a resident of the Middle District and the individual responsible for the general administration and enforcement of Pennsylvania's Subsidence Control Program.

11. Defendant Thomas B. Alexander is Chief of DER's Section of Mine Subsidence Regulation, a resident of this District and the individual responsible for the day-to-day administration and enforcement of Pennsylvania's Subsidence Control Program.

Facts

12. Coal mine subsidence is the lowering of strata overlying an underground coal mine, including the surface, due to underground coal extraction.

13. Pennsylvania recognizes three estates in land, namely mineral (in this case coal), surface and the subjacent support estate (hereafter "support estate"). These three estates may be and frequently are owned by different persons.

14. Prior to the passage of the Subsidence Act, when there had been a severance of the coal estate from the surface, the owner of the coal estate was not liable to the surface owner for damage resulting from coal mine subsidence where the coal estate owner had acquired the support estate thereby securing a waiver of the surface owner's right of support and/or a release of damages.

15. A waiver of the surface support estate and related release of damages are interests which, in Pennsylvania, are binding upon subsequent purchasers of surface lands.

16. Prior to the passage of the Subsidence Act, a great majority of underground mine operators were not

absolutely liable to the owner of the surface estate for coal mine subsidence caused by underground mining operations because they had acquired the support estate and related waivers of the right of support or releases of damages from the owners of the surface.

17. Prior to the Subsidence Act, owners of the coal estate could not be required to leave in place coal under privately owned surface lands, structures and features to support such lands, structures and features.

18. Prior to the Subsidence Act, whenever surface support was deemed necessary for the protection of publicly owned surface lands, structures and features, the owners of the coal estate were entitled to just compensation for having to leave their coal in place as support for the surface.

19. Section 4 of the Subsidence Act, 52 P.S. § 1406.4 ("Section 4"), requires deep mine operators ("operators") to mine coal so as not to cause subsidence damage to the following surface structures in place on April 27, 1966 ("Section 4 Protected Structures"): (a) any public building or any non-commercial structure customarily used by the public, including but not limited to churches, schools, hospitals and municipal utilities or municipal public service operations; (b) any dwelling used for human habitation; and (c) any cemetery or public burial ground.

20. Section 6(a), 52 P.S. § 1406.6(a) ("Section 6(a)"), of the Subsidence Act requires operators to compensate the owners of Section 4 Protected Structures for damage caused in violation of Section 4.

21. These statutory obligations to support and compensate are imposed even though an operator had purchased the support estate thereby securing a waiver of the right of surface support and/or a release of damages from the owner of any Section 4 Protected Structure or

his predecessor in title, and is imposed without regard to when the support estate was severed from the surface.

22. Section 15 of the subsidence Act, 52 P.S. § 1406.15 ("Section 15"), confers upon any owner of surface land who owns, or wishes to construct, a structure not protected by Section 4, the right to compel the owners of the economic interests in the coal beneath his surface land or the mine operator to sell him enough coal to provide surface support.

23. The Subsidence Regulations (25 Pa. Code §§ 89.141, *et seq.*) for the most part became effective on July 31, 1982 and greatly expand the limited statutory obligations to support surface structures which are imposed by the Subsidence Act.

24. On July 2, 1983, DER published 25 Pa. Code § 89.147, its regulation governing an operator's responsibilities to correct subsidence damage to surface lands and surface structures, and simultaneously suspended subsection (a), which related to an operator's duty to correct subsidence damage to surface structures not protected by Section 4. Nevertheless, this regulation greatly expands the operator's liability for subsidence damage.

25. Section 89-147(b) of the Subsidence Regulations imposes liability to correct any and all subsidence damage to surface lands even if the owner of such land fails or refuses to purchase support coal from an operator as authorized by Section 15.

26. Various sanctions can be imposed against an operator who fails to comply with either the Subsidence Act or DER's all encompassing Subsidence Regulations. These sanctions include civil and criminal penalties, revocation of permits and orders to cease operations.

27. These sanctions are particularly severe because DER imposes an obligation upon operators to compensate surface owners for damages caused by mining activ-

ities even though operators have fully complied with DER's regulations governing support and mining methods and has otherwise mined in a prudent, non-negligent manner.

28. Section 5(a) of the Subsidence Act, 52 P.S. § 1406.5 ("Section 5(a)"), provides that an operator shall describe in his permit application the mining methods he will take to prevent subsidence damage to Section 4 Protected Structures.

29. Section 5(e) of the Subsidence Act, 52 P.S. § 1406.5(e), requires that an operator is to describe in his permit application the types of mining methods he will use, to the extent economically and technologically feasible, to prevent subsidence causing material damage.

30. Section 89.145(a) of the Subsidence Regulations, as modified on July 2, 1983, provides that, in addition to Section 4 Protected Structures, the following structures and features must also be protected against subsidence damage: (a) Public buildings and buildings customarily used by the public, including churches, schools, hospitals, courthouses, and government offices constructed after April 27, 1966; (b) perennial streams which serve as a significant source of public water supply and impoundments with a storage volume exceeding 20 acre feet; (c) aquifers which serve as a significant source of public water water supply; and (d) coal refuse deposits.

31. Section 89.146(b) of the Subsidence Regulations, as modified on July 2, 1983, provides that at a minimum an operator must leave 50% of his coal in pillars or blocks in calculated areas beneath Section 4 Protected Structures and all other surface structures and features described in § 89.145(a) unless the operator can show that no subsidence damage will occur if less coal is left in place to support the surface.

32. On July 2, 1983, DER suspended Sections 89.145 (d) and 89.146(e) which provided that unless subsidence

damage to all other surface features and structures described in 89.145(d) of the regulations was avoided, an operator would be required to leave no less than 50% of his coal in calculated support areas beneath these structures.

33. Despite the suspension of Sections 89.145(d) and 89.146(e) of the Subsidence Regulations DER still intends to enforce a Support Policy which will require an operator to leave his coal in calculated support area beneath other structures and features, including all perennial streams, which are not protected by Section 4, even if the owners of such structures, features and surface lands do not purchase the support coal from the operator as authorized by Section 15, should an operator be unable to avoid damaging such structures, features or lands.

34. Once an operator is required by DER to leave his coal beneath any structure, land or surface feature as support, he cannot mine this coal and may be unable to mine other coal adjacent to the support pillars.

35. Operators are neither to be compensated by any person for the value of their coal which DER requires them to leave beneath surface lands, features and the greatly expanded category of protected structures nor are they to be compensated for the value of their coal left in place as support for Section 4 Protected Structures.

36. Plaintiff KBCA's operating budget is funded by dues paid by its member companies.

37. The dues which fund KBCA's operating budget are based upon the annual tonnage of bituminous coal mined by its member companies or their affiliates including Consol, USSM and Helvetia.

38. Because the challenged provisions of the Subsidence Act and regulations will result in less coal being

mined in Pennsylvania by USSM, Helvetia and Consol and other of its member companies or their affiliates, KBCA will suffer irreparable injury in fact, which cannot be remedied at law, as a result of the implementation and enforcement of the challenged provisions of the Subsidence Act and regulations.

COUNT I

39. Plaintiffs hereby incorporate paragraphs 1 through 38, above, as a part hereof.

40. The longwall method of mining is a full extraction mining method which involves the mining of a block of coal, known as a panel, typically 500 feet wide and up to 5,000 feet long. Longwall mining inherently involves extraction of all of the coal in the panel leaving no pillars.

41. The standard room and pillar method of mining involves working coal seams so that pillars of coal are left in place to support the mine roof at the workings advance. Later, the pillars are systematically removed in retreat mining. Operators have never been required in the past to leave at least 50% of the coal seam in place at room and pillar operations in areas of those mines which are not overlaid by Section 4 Protected Structures. Instead, operators generally recover 40% to 50% of the coal seam while the mine is in development and then remove up to an additional 25% to 35% in retreat mining, making total recovery in the range of 65% to 85% of the underground coal reserves.

42. U.S.S.M. is conducting full extraction mining operations, including longwall mining operations, within this District, beneath surface and subsurface lands, structures and features described in Section 89.145 of the Subsidence Regulations.

43. Consol, by itself or through affiliates, is conducting full extraction mining operations including longwall

mining operations within this District beneath surface and subsurface lands, structures and features described in Section 89.145 of the Subsidence.

44. Helvetia is conducting full extraction mining operations which utilize the standard method of room and pillar mining beneath surface and subsurface lands, structures and features described in Section 89.145 of the Subsidence Regulations.

45. Each plaintiff company has invested millions of dollars to acquire the coal to be mined, construct mining facilities and purchase mining equipment.

46. To insure the continued right to conduct mining operations each plaintiff company is required by Section 4, Section 89.145 of the Subsidence Regulations as modified July 2, 1983 and DER's Support Policy to plan their operations in a manner which prevents or avoids any subsidence damage, whether material or not, to the various surface and subsurface lands, structures and features described in Section 89.145.

47. Pursuant to Section 4 and Section 89.146 of the Subsidence Regulations, as modified July 2, 1983, and DER's Support Policy, the plaintiff companies must plan their operations in a manner which leaves no less than 50% of their coal in place beneath the various surface and subsurface lands, structures and features described in Section 89.145 unless they can demonstrate that no subsidence damage will result from their operations.

48. None of the plaintiff companies can demonstrate that their underground mining operations will prevent or avoid all subsidence damage to the surface and subsurface lands, structures and features overlying their underground operations.

49. The plaintiff companies will be required to curtail or abandon their planned and projected operations if they are forced to leave their coal in the path of their

projected underground operations as support for such overlying surface lands, structures or features.

50. Section 4, Sections 89.145 and 89.146 of the Subsidence Regulations, as modified July 2, 1983 and DER's Support Policy are unconstitutional and void because they:

a. appropriate private property for a non-public use in violation of the Fifth and Fourteenth Amendments to the United States Constitution, to the extent they require plaintiffs to support non-public lands, structures and features overlying their operations;

b. deprive plaintiffs of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution, to the extent they require plaintiffs to support non-public lands, structures and features;

c. appropriate private property without compensation and further deprive plaintiffs of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution; and

d. impair contractual rights in violation of Article I, § 10 of the United States Constitution.

51. Absent relief from this Court, each plaintiff mining company will be irreparably harmed.

52. The plaintiff mining companies have no adequate remedy at law.

COUNT II

53. Plaintiffs hereby incorporate paragraphs 1 through 52, above, as a part hereof.

54. Each plaintiff company has acquired waivers of liability for, or releases of, any damages which might be caused by its mining activities which bind the owners

of the surface lands overlying its projected mining operations.

55. Pursuant to Section 6(a) and Section 89.147(b) of the Subsidence Regulations, each named plaintiff company is required to repair, or pay compensation for, any subsidence damage they cause to any Protected Structure or surface lands.

56. Section 6(a) and Section 89.147(b) of the Subsidence Regulations are unconstitutional and void because they:

a. impair contractual rights in violation of Article I, § 10 of the United States Constitution; and

b. deny plaintiffs due process of law in violation of the Fourteenth Amendment to the United States Constitution.

57. Absent relief from this Court, each plaintiff mining company will be irreparably harmed.

58. The plaintiff mining companies have no adequate remedy at law.

COUNT III

59. Plaintiffs hereby incorporate paragraphs 1 through 58, above.

60. Each plaintiff mining company is conducting underground mining operation beneath various surface and subsurface lands, structures and features which are not protected by Section 4.

61. The record owners and residents of the surface lands, structures and features overlying the projected path of plaintiffs' underground operations, which are not protected by Section 4, can, pursuant to Section 15, compel a purchase of coal which these plaintiff companies either own or have the exclusive right to mine.

62. Each plaintiff mining company currently has the right to mine all the coal in the path of its projected underground operations.

63. Each plaintiff mining company will be required to curtail or abandon its projected underground operations if it is denied the right to mine the coal in the path of its projected underground operations.

64. Section 15 is unconstitutional and void because it:

a. appropriates private property for a non-public use in violation of Fifth and Fourteenth Amendments to the United States Constitution;

b. deprives plaintiffs of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution; and

c. impairs contractual rights in violation of Article I, § 10 of the United States Constitution.

65. Absent relief from this Court, each plaintiff mining company will be irreparably harmed.

66. The plaintiff mining companies have no adequate remedy at law.

Relief Requested

A. Preliminary and permanently enjoin defendants from enforcing Section 4 and Section 15 of the Subsidence Act, Sections 89.145 and 89.146 of the Subsidence Regulations as now in effect, and DER's Support Policy;

B. Declare Section 4, Section 6 and Section 15 of the Subsidence Act, Sections 89.145 and 89.146 of the Subsidence Regulations, as now in effect, and DER's Support Policy to be unconstitutional and void in whole or in part, and thereafter permanently enjoin defendants from enforcing against plaintiffs those provisions which are held to be invalid;

C. Award plaintiffs costs and attorneys' fees; and

D. Such other relief as is just and proper.

Respectfully submitted,

ROSE, SCHMIDT, DIXON & HASLEY

By /s/ Henry Ingram by RL
HENRY MCC. INGRAM

By /s/ Thomas C. Reed
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Plaintiffs,

v.

NICHOLAS DEBENEDICTIS, *et al.*,
Defendants.

ANSWERS TO FIRST
INTERROGATORIES TO PLAINTIFFS

The following interrogatories are directed to the Plaintiffs in this matter, to be answered under oath and in compliance with the Federal Rules of Civil Procedure, by November 7, 1983 in order to comply with the order of the Honorable Donald E. Ziegler of October 17, 1983. If the space provided for an answer is insufficient, attach additional sheets.

I. DEFINITIONS

The following definitions are applicable to each interrogatory:

1. ACT refers to the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31 (Spec. Sess.), as amended, 52 P.S. § 1406.1 *et seq.*

D. DEPARTMENT refers to the Department of Environmental Resources.

3. IDENTIFY, when referring to a person, means to provide that person's name, address, occupation, college degrees, areas of graduate work, occupations within the

last ten years, and any books, articles, studies, and publications to which that person contributed.

4. MINE refers to an underground bituminous coal mine subject to the ACT, which has been operated by any plaintiff in this action.

II. TIME

Unless a different time is specifically indicated in the interrogatory, the time period for each interrogatory extends from the beginning of underground mining operations by the plaintiffs until December 31, 1982.

III. INTERROGATORIES

1. For each MINE operated by a plaintiff after April 27, 1966, provide the following information:

1.(a) The total coal acreage of the MINE; and

ANSWER:

CONSOL:

Blacksville #1—13,100 acres
Blacksville #2—13,900 acres
Humphrey—14,300 acres
Renton—4,517 acres
Laurel—1,924 acres
Westland II—15,850 acres
Montour #4—7,973 acres

USM (Frick):

Dilworth—12,674 acres
Maple Creek—15,420 acres

USSM (Cumberland):

10,434 acres

Helvetia:

Lucerne #6—8,208 acres
Lucerne #8—2,800 acres
Lucerne #9—1,832 acres

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

1.(b) The average amount (in tons) of coal per acre within that coal acreage.

ANSWER:

CONSOL:

Blacksville #1—11,470 tons/acre
Blacksville #2—11,470 tons/acre
Humphrey—11,000 tons/acre
Renton—12,945 tons/acre
Laurel—11,730 tons/acre
Westland II—16,690 tons/acre
Montour #4—12,225 tons/acre

USSM (Frick):

Dilworth—12,636 tons/acre
Maple Creek—10,249 tons/acre

USSM (Cumberland):

12,474 tons/acre

Helvetia:

Lucerne #6—8,400 tons/acre
Lucerne #8—8,100 tons/acre
Lucerne #9—9,900 tons/acre

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

2. For each MINE operated by a plaintiff after April 27, 1966, provide the following information for the years 1960-1982:

- (a) The amount of coal (in tons) mined each year;
- (b) The average cost per ton of the coal mined each year; and
- (c) The average market price per ton of the coal mined each year.

ANSWER:

Information will be supplied once available and after an agreement on a protective order has been reached.

3. For each MINE operated by a plaintiff after April 27, 1966, provide the following information for any structures protected by Section 4 of the ACT (52 P.S. § 1406.4) under which mining occurred after April 27, 1966:

- 3.(a) The total number of structures, specifying the number of dwellings, the number of public buildings, and the number of cemeteries;

ANSWER:

CONSOL:

Blacksville #1—approximately 115 dwellings
 approximately 1 public building
 approximately 6 cemeteries

Blacksville #2—approximately 210 dwellings
approximately 10 public buildings
approximately 10 cemeteries

Humphrey—approximately 284 dwellings
approximately 5 public buildings
approximately 9 cemeteries

Renton—approximately 721 dwellings
approximately 10 public buildings
approximately 1 cemetery

Laurel—approximately 26 dwellings
approximately 17 public buildings
approximately 0 cemeteries

Westland II—approximately 43 dwellings
0 public buildings
0 cemeteries

Montour #4—approximately 759 dwellings
4 public dwellings
0 cemeteries

USSM (Frick):

Dilworth—approximately 235 dwellings
approximately 3 public buildings
approximately 1 cemeteries

Maple Creek—approximately 198 dwellings
approximately 2 public buildings
approximately 2 cemeteries

USSM (Cumberland):

approximately 27 dwellings
approximately 1 public building
approximately 2 cemeteries

Helvetia:

Lucerne #6—approximately 36 dwellings
approximately 1 public building
0 cemeteries

Lucerne #8—approximately 5 dwellings
0 public building
0 cemeteries

Lucerne #9—approximately 11 dwellings
0 public building
0 cemeteries

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

- 3.(b) The amount of coal (in tons) left unmined to support those structures; and

ANSWER:

CONSOL:

Blacksville #1—at least 2,400,000 tons left in “support areas” for all structures

Blacksville #2—at least 4,600,000 tons left in “support areas” for all structures

Humphrey—at least 1,950,000 tons left in “support areas” for all structures

Renton—at least 5,500,000 tons left in “support areas” for all structures

Laurel—at least 450,000 tons left in “support areas” for all structures

Westland II—at least 430,000 tons left in “support areas” for all structures

Montour #4—at least 7,590,000 tons left in “support areas” for all structures

USSM (Frick):

Dilworth—at least 458,812 tons left in “support areas” for all structures

Maple Creek—at least 1,565,842 tons left in “support areas” for all structures

USSM (Cumberland):

at least 1,381,000 tons left in “support areas” for all structures

Helvetia:

Lucerne #6—at least 278,000 tons left in “support areas” for all structures

Lucerne #8—at least 11,000 tons left in “support areas” for all structures

Lucerne #9—at least 50,000 tons left in “support areas” for all structures

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

3.(c) The total amount paid to the structure owners under Section 6 of the Act (52 P.S. § 1406.6).

ANSWER:

CONSOL:

Blacksville #1—none paid directly pursuant to Section 6

Blacksville #2—none paid directly pursuant to Section 6

Humphrey—\$895 paid directly pursuant to Section 6

Renton—\$4,900 paid directly pursuant to Section 6

Laurel—none paid directly pursuant to Section 6

Westland II—none paid directly pursuant to Section 6

Montour #4—\$26,500 paid directly pursuant to Section 6

USSM (Frick):

Dilworth—none paid directly to pursuant to Section 6

Maple Creek—\$154,410.00 paid directly pursuant to Section 6

USSM (Cumberland):

None paid directly pursuant to Section 6

Helvetia:

Lucerne #6—none paid directly pursuant to Section 6

Lucerne #8—none paid directly pursuant to Section 6

Lucerne #9—none paid directly pursuant to Section 6

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

4. For each MINE to be operated by a plaintiff after December 1, 1983, provide the following information:

4.(a) The total number of structures protected by Section 4 of the ACT (52 P.S. § 1406.4) under which coal was removed since January 1, 1979, specifying the number of dwellings, the number of public buildings, and the number of cemeteries; and

ANSWER:

CONSOL:

Blacksville #1—0 dwellings
0 public building
0 cemeteries
Blacksville #2—0 dwellings
0 public buildings
0 cemeteries
Humphrey—30 dwellings
1 public buildings
2 cemeteries
Renton—271 dwellings
3 public buildings
0 cemeteries
Laurel—15 dwellings
17 public buildings
0 cemeteries
Westland II—43 dwellings
0 public buildings
0 cemeteries
Montour #4—Mine closed

USSM (Frick):

Dilworth—135 dwellings
1 public building
1 cemetery

Maple Creek—40 dwellings
1 public buildings
0 cemeteries

USSM (Cumberland):

23 dwellings
1 public building
2 cemeteries

Helvetia:

Lucerne #6—17 dwellings
0 public building
0 cemeteries
Lucerne #8— 3 dwellings
0 public building
0 cemeteries
Lucerne #9— 8 dwellings
0 public building
0 cemeteries

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

4.(b) The total number of structures protected by Section 4 of the ACT under which mining is projected to occur between January 1, 1985 and December 31, 1989, specifying the number of dwellings, the number of public buildings, and the number of cemeteries.

ANSWER:

CONSOL:

Blacksville #1—10 dwellings
0 public building
0 cemeteries
Blacksville #2—5 dwellings
0 public buildings
1 cemeteries

Humphrey—22 dwellings
 0 public buildings
 3 cemeteries

Renton—100 dwellings
 0 public buildings
 0 cemeteries

Laurel—20 dwellings
 1 public buildings
 0 cemeteries

Westland II—13 dwellings
 0 public buildings
 0 cemeteries

Montour #4—mine closed

USSM (Frick):

Dilworth—64 dwellings
 0 public buildings
 0 cemeteries

Maple Creek—54 dwellings
 0 public buildings
 0 cemeteries

USSM (Cumberland):

28 dwellings
 1 public building
 0 cemeteries

Helvetia:

Lucerne #6—12 dwellings
 0 public building
 0 cemeteries

Lucerne #8—16 dwellings
 0 public building
 0 cemeteries

Lucerne #9—15 dwellings
 0 public building
 1 cemeteries

Information relating to our mines operated by plaintiffs is being compiled and will be supplied once available. In certain cases the information supplied in answer to this interrogatory may reflect the period January 1, 1984 through December 31, 1988 rather than January 1, 1985 through December 1, 1989.

5. For each MINE operated by a plaintiff after April 27, 1966, provide the following information:

5.(a) The total number of structures for which protection has been purchased under Section 15 of the ACT (52 P.S. § 1406.15), specifying the number of dwellings and the number of commercial buildings;

ANSWER:

CONSOL:

Blacksville #1—none directly pursuant to Section 15
 Blacksville #2—none directly pursuant to Section 15
 Humphrey—none directly pursuant to Section 15
 Renton—none directly pursuant to Section 15
 Laurel—none directly pursuant to Section 15
 Westland II—none directly pursuant to Section 15
 Montour #4—75 dwellings
 6 commercial buildings

USSM (Frick):

Dilworth—none directly pursuant to Section 15
 Maple Creek—5 directly pursuant to Section 15

USSM (Cumberland):

None directly pursuant to Section 15.

Helvetia:

Lucerne #6—none directly pursuant to Section 15
 Lucerne #8—none directly pursuant to Section 15
 Lucerne #9—none directly pursuant to Section 15

Information relating to other mines operated by Consol and USSM is being compiled and will be supplied once available.

5.(b) The total amount of coal (in tons) left unmined to protect structures under Section 15 of the ACT (52 P.S. § 1406.15); and

ANSWER:

CONSOL:

Blacksville #1—none directly pursuant to Section 15
 Blacksville #2—none directly pursuant to Section 15
 Humphrey—none directly pursuant to Section 15
 Renton—none directly pursuant to Section 15
 Laurel—none directly pursuant to Section 15
 Westland II—none directly pursuant to Section 15
 Montour #4—256,967 tons directly pursuant to Section 15

USSM (Frick):

Dilworth—none directly pursuant to Section 15
 Maple Creek—78,968 tons directly pursuant to Section 15

USSM (Cumberland):

None directly pursuant to Section 15.

Helvetia:

Lucerne #6—none directly pursuant to Section 15
 Lucerne #8—none directly pursuant to Section 15
 Lucerne #9—none directly pursuant to Section 15

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

5.(c) The total amount of compensation received for the coal left unmined to protect structures under Section 15 of the Act (52 P.S. § 1406.15).

ANSWER:

CONSOL:

Blacksville #1—none directly pursuant to Section 15
 Blacksville #2—none directly pursuant to Section 15
 Humphrey—none directly pursuant to Section 15
 Renton—none directly pursuant to Section 15
 Laurel—none directly pursuant to Section 15
 Westland II—none directly pursuant to Section 15
 Montour #4—\$146,614

USSM (Frick):

Dilworth—none directly pursuant to Section 15
 Maple Creek—\$18,312.75

USSM (Cumberland):

None directly pursuant to Section 15

Helvetia:

Lucerne #6—none directly pursuant to Section 15
 Lucerne #8—none directly pursuant to Section 15
 Lucerne #9—none directly pursuant to Section 15

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

6. For each MINE operated after October 10, 1980, provide the following information concerning the notices sent to surface owners pursuant to Section 15(c) of the ACT (52 P.S. § 1406.15c):

6.(a) The number of notices sent;

ANSWER:

CONSOL:

Blacksville #1—85
 Blacksville #2—52

Humphrey—7
 Renton—7
 Laurel—35
 Westland II—41
 Montour #4—mine closed

USSM (Frick):

Dilworth—485
 Maple Creek—383

USSM (Cumberland):

57

Helvetia:

Lucerne #6—124
 Lucerne #8—26
 Lucerne #9—47

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

6.(b) The language used in the notices (this portion of the interrogatory can be answered by attaching copies of the notices actually sent, as long as the samples encompass any variations in the language of the notices).

ANSWER:

CONSOL:

Copies of the notices utilized are attached and marked "Consol Notice."

USSM (Frick):

Dilworth—A copy of the notice is attached and marked "USSM Notice."
 Maple Creek—A copy of the notice is attached and marked "USSM Notice".

USSM (Cumberland):

A copy of the notice will be supplied.

Helvetia:

Lucerne #6—A copy of the notice is attached and marked "Helvetia Notice."
 Lucerne #8—A copy of the notice is attached and marked "Helvetia Notice."
 Lucerne #9—A copy of the notice is attached and marked "Helvetia Notice."

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

6.(c) The total number of surface owners who exercised their rights under Section 15 of the ACT (52 P.S. § 1406.15) in response to the notices.

ANSWER:

CONSOL:

None known, to date.

USSM (Frick):

Dilworth—19
 Maple Creek—17

USSM (Cumberland):

None known, to date.

Helvetia:

Lucerne #6—None known, to date.
 Lucerne #8—None known, to date.
 Lucerne #9—None known, to date.

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

7. For each MINE operated by a plaintiff after April 27, 1966, provide the following information:

7.(a) The total amount of coal (in tons) left unmined to protect oil wells and gas wells as required by the Gas Operations Well-Drilling Petroleum and Coal Mining Act, Act of November 30, 1955, P.L. 756, as amended, 52 P.S. § 2101 *et seq.*;

ANSWER:

CONSOL:

Blacksville #1—approximately 150,000 tons
Blacksville #2—approximately 475,000 tons
Humphrey—approximately 1,283,000 tons
Renton—approximately 1,189,000 tons
Laurel—0 tons
Westland II—approximately 102,000 tons
Montour #4—approximately 219,000 tons

USSM (Frick):

Dilworth—approximately 16,300 tons
Maple Creek—approximately 529,975 tons

USSM (Cumberland):

approximately 360,000 tons.

Helvetia:

Lucerne #6—approximately 65,000 tons
Lucerne #8—approximately 35,000 tons
Lucerne #9—approximately 65,000 tons

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

7.(b) The total amount of coal (in tons) left unmined to protect bodies of water as required by the Act of December 22, 1959, P.L. 1994, 52 P.S. § 3101 *et seq.*; and

ANSWER:

CONSOL:

Blacksville #1—None.
Blacksville #2—None.
Humphrey—None.
Renton—None.
Laurel—None.
Westland II—None.
Montour #4—1,137,000 tons

USSM (Frick):

Dilworth—None.
Maple Creek—None.

USSM (Cumberland):

None.

Helvetia:

Lucerne #6—None.
Lucerne #8—None.
Lucerne #9—None.

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

7.(c) The total amount of coal (in tons) left unmined to provide the barrier pillar required by Section 291 of the Pennsylvania Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, as amended, 52 P.S. § 701-291.

ANSWER:

CONSOL:

Blacksville #1—approximately 810,000 tons
Blacksville #2—approximately 59,000 tons
Humphrey—approximately 68,000 tons

Renton—approximately 794,000 tons
 Laurel—approximately 490,000 tons
 Westland II—Not applicable.
 Montour #4—972,165 tons

USSM (Frick):

Dilworth—approximately 278,497 tons
 Maple Creek—approximately 954,284 tons

USSM (Cumberland):

None.

Helvetia:

Lucerne #6—approximately 5,300,000 tons
 Lucerne #8—approximately 400,000 tons
 Lucerne #9—approximately 100,000 tons

Information relating to other mines operated by plaintiffs is being compiled and will be supplied once available.

8. IDENTIFY each person whom the plaintiffs expect to call as an expert witness in any hearing in this matter, and for each person provide the following information:

(a) State the subject matter on which the expert is expected to testify; and

(b) State the substance of the facts and opinions to which the expert is expected to testify, and summarize the grounds for each opinion.

Plaintiffs are compiling this information and it will be supplied once available.

Respectfully submitted,

ROSE, SCHMIDT, DIXON
 & HASLEY

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 HENRY INGRAM

By /s/ Thomas C. Reed
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 Association, et al.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(C.A. No. 82-2712)

KEYSTONE BITUMINOUS COAL ASSOCIATION, a Pennsylvania unincorporated association of bituminous coal producers, individually and as represented by certain of its member companies; HELVETIA COAL COMPANY, a Pennsylvania corporation; ROCHESTER & PITTSBURGH COAL COMPANY, a Pennsylvania corporation; U.S. STEEL MINING CO., INC., a Delaware corporation, individually and as a trustee *ad litem* for KEYSTONE BITUMINOUS COAL ASSOCIATION; UNITED STATES STEEL CORPORATION, a Delaware corporation; and CONSOLIDATION COAL COMPANY, a Delaware corporation,

v. *Plaintiffs,*

NICHOLAS DEBENEDICTIS, individually and in his capacity as Secretary of the Commonwealth of Pennsylvania, Department of Environmental Resources; PHILIP ZULLO, individually and in his capacity as Chief, Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources; and THOMAS B. ALEXANDER, individually and in his capacity as Chief, Section of Mine Subsidence Regulation of the Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources,

Defendants.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

AND NOW come the plaintiffs above-named, by their counsel, Rose, Schmidt, Dixon & Hasley and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, move this Honorable Court to issue an Order granting Sum-

mary Judgment in favor of plaintiffs on the claims which are described below and grant them the relief requested in their amended complaint on the basis of the following:

1. This is a civil rights action which seeks to have declared unlawful and enjoined certain provisions of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act ("Subsidence Act"), Act of April 27, 1966, P.L. 31, Spec. Sess. No. 1, *as amended*, October 10, 1980, P.L. 874, No. 156, 52 P.S. 1406.1 *et seq.* (Supp. 1983) and certain regulations and policies of the Pennsylvania Department of Environmental Resources ("DER") which implement the Subsidence Act ("Subsidence Regulations"). The Subsidence Act, the Subsidence Regulations and policies of the defendants constitute Pennsylvania's Subsidence Control Program. The challenged provisions deprive plaintiffs of rights guaranteed them by the Constitution of the United States.

2. The plaintiffs have challenged the following provisions of Pennsylvania's Subsidence Control Program:

(A) Section 4 of the Subsidence Act, 52 P.S. § 1406.4;

(B) Sections 89.145 and 86.146 of DER's Subsidence Regulations, 25 Pa. Code §§ 89.145 and 89.146;

(C) Section 15 of the Subsidence Act, 52 P.S. § 1406.15;

(D) Section 6 of the Subsidence Act, 52 P.S. § 1406.6; and

(E) Section 89.147(b) of DER's Subsidence Regulations, 25 Pa. Code § 89.147(b).

3. Plaintiffs seek judgment on their claims that the foregoing statutory and regulatory provisions are in conflict with the rule announced in *Pennsylvania Coal Com-*

pany v. Mahon, 260 U.S. 393 (1922), and/or violate Article I, Section 10 of the Constitution of the United States and/or the Fourteenth Amendment to the Constitution of the United States. In the *alternative*, they also contend that the cumulative impact of the application of these provisions constitutes a violation of the Fourteenth Amendment, a claim which is not now at issue here.

4. On the basis of the record to date, including plaintiffs' verified amended complaint, the Stipulations of Counsel dated November 17, 1983, plaintiffs' answers to Defendants' First Set of Interrogatories, depositions of H. Douglas Dahl, Thomas R. Lloyd and Thomas B. Alexander as well as affidavits which accompany this motion, plaintiffs respectfully submit that there exists no genuine issue as to, among others, the following material facts:

(A) Plaintiff, Helvetia Coal Company ("Helvetia"), is a Pennsylvania corporation and a wholly-owned subsidiary of plaintiff, Rochester & Pittsburgh Coal Company ("R&P"). Helvetia engages in underground coal mining operations in the Western District of Pennsylvania. Helvetia leases and/or controls substantial underground bituminous coal reserves beneath the surface and subsurface property of others in this District.

(B) Plaintiffs, R&P, is a Pennsylvania corporation which owns, leases and/or controls substantial coal reserves beneath the surface and subsurface property of others in this District. R&P does not engage directly in coal mining operations. Instead, certain of its properties are being mined by Helvetia. R&P has joined in this litigation because it owns, leases and/or controls the coal which is mined by Helvetia.

(C) Plaintiff, U.S. Steel Mining Co., Inc. ("U.S.S.M."), is a Delaware corporation, a member of Keystone and a wholly-owned subsidiary of plain-

tiff, United States Steel Corporation ("U.S. Steel"). U.S.S.M. engages in underground coal mining operations in the Western District of Pennsylvania. U.S.S.M. controls substantial coal reserves beneath the surface and subsurface property of others in this District.

(D) Plaintiff, U.S. Steel, is a Delaware corporation which owns, leases and/or controls substantial coal reserves beneath the surface and subsurface property of others in this District including the coal reserves being mined by U.S.S.M. U.S. Steel does not engage directly in coal mining operations. Instead, it owns leases and/or controls coal which is mined by U.S.S.M. pursuant to operating agreements.

(E) Plaintiff, Consolidation Coal Company ("Consol"), is a Delaware corporation which by itself or through affiliates engages in underground coal mining operations in the Western District of Pennsylvania, and also owns, leases and/or controls substantial coal reserves beneath the surface and subsurface property of others in this District.

(F) Section 4 of the Subsidence Act prohibits mining which causes subsidence damage to the following categories of structures and features ("Section 4 Protected Structures"), if in place on April 27, 1966, the effective date of the Act:

(1) public buildings and non-commercial structures customarily used by the public including, but not limited to, churches, schools, hospitals and municipal utilities of municipal public service operations;

(2) occupied dwellings; and

(3) cemeteries.

DER applies a formula, subject to limited exceptions, requiring 50% of the coal beneath Section 4 Protected Structures to be left in place as a means of providing surface support. Once coal has been left in place beneath Section 4 Protected Structures in accordance with the 50% rule, plaintiff companies are not permitted to recover it thereafter, and, as a practical matter, will not be able to do so absent extraordinary circumstances.

(G) The 50% rule has been extended by defendants to additional classes of buildings and surface features beyond those set forth in Section 4 of the Subsidence Act as follows:

- (1) public buildings and non-commercial buildings customarily used by the public after April 27, 1966, including churches, schools, hospitals, courthouses, and government offices;
- (2) impoundments of water with the storage volume of 20 acre feet or more and perennial streams;
- (3) aquifers which serve as a significant source of water for a public water systems; and
- (4) coal refuse disposal areas.

See 25 Pa. Code § 89.145(a) and § 89.146(b).

(H) Section 15 of the Subsidence Act gives surface owners who own or decide to build structures which are not protected by Section 4 ("Section 15 Structures") and who desire to prevent subsidence damage, the right to purchase the amount of coal necessary for such protection.

(I) Section 6 of the Subsidence Act requires mine operators to repair or compensate for any subsidence damage caused to a Section 4 Protected Structure. Section 15(b) of the Subsidence Act, 52 P.S. §1406.15(b) imposes a comparable obligation as to Section 15 Structures.

(J) 25 Pa. Code § 89.147(b) requires mine operators to restore surface land to its premining condition whenever underground mining activity reduces the reasonably foreseeable uses of surface land, to the extent economically and technologically feasible.

(K) Section 6 requires an operator to repair or compensate for damage to Section 4 Protected Structures and 25 Pa. Code § 89.147(b) requires an operator to restore surface land even though it mined in conformity with the 50% rule or a DER approved alternative method.

(L) Plaintiffs mining companies, by virtue of deeds, contracts and other instruments of record, either own or control the right to mine virtually all the coal and have acquired the support estate in the mines they operate beneath the surface lands of others which overlay their mines. Having acquired the support estate, plaintiff mining companies have no liability to repair, compensate for or restore any property damaged by reason of their removal of subjacent support during mining.

(M) In addition, plaintiff mining companies have in virtually all cases acquired waivers or releases from the owner of the surface or their predecessors in title which relieve plaintiffs from liability for subsidence damage caused by the removal of other coal.

(N) Pursuant to Section 4 of the Act and Sections 89.145 and 89.146 of DER's Subsidence Regulations, plaintiff mining companies have been and/or will be required to leave coal in place and unmined beneath the structures and features described in those sections in derogation of their coal and support estates without receiving any compensation from the owner of the surface or structures for the value of the coal and the support estate or for other coal

rendered valueless by the disruption caused to their mining plans.

(O) Pursuant to Section 15 of the Subsidence Act, owners of surface overlying plaintiff mining companies' coal who do not own the support estate and who cannot require plaintiff mining companies to repair or compensate for any subsidence damage caused by the removal of their coal or support estates have reacquired and will continue to be able to reacquire these property and contract rights by paying compensation even though the plaintiff mining companies did not and do not wish to relinquish or sell these property rights.

(P) Pursuant to Section 6 of the Subsidence Act, plaintiff mining companies are required to repair or compensate for subsidence damage caused to the structures and features listed in Section 4 of the Act notwithstanding the fact that the owners of such structures and features did not or do not own the support estate and have (by themselves or by their predecessors in title) waived or released any claim, for such repairs or damages.

(Q) Pursuant to Section 89.147(b) of DER's Subsidence Regulations, plaintiff mining companies will be required to restore subsidence damage which materially reduces the reasonably foreseeable uses of another's surface lands notwithstanding the fact that such owners do not own the support estate and have (by themselves or by their predecessors in title) waived or released any claim for restoration of damages.

5. Plaintiffs further submit that, even though there presently exists a dispute as the cumulative impact of each of the above provisions upon plaintiffs' total investment in their respective business operations, the above facts, which are not in genuine dispute, also establish the following:

(A) The provisions of Section 4 of the Act and Sections 89.145 and 89.146 of DER's Subsidence Regulations destroy existing property and contract rights;

(B) The provisions of Section 15 of the Act destroy private property and contract rights and involuntarily appropriate private property for a non-public use;

(C) The provisions of Section 6 of the Act destroy private property and contract rights; and

(D) Section 89.147(b) of DER's Subsidence Regulations destroy private property and contract rights.

6. For all of the foregoing reasons, plaintiffs are entitled to judgment on their claims that the provisions challenged in this action either conflict with the rule of *Mahon, supra*, and/or violates Article I, Section 10 and/or the Fourteenth Amendment of the United States Constitution.

WHEREFORE, plaintiffs respectfully request this Honorable Court to grant them Summary Judgment on all the Counts of their amended Complaint at issue here and further grant them the relief requested in their amended complaint and such other relief as is just and proper.

Respectfully submitted,

ROSE, SCHMIDT, DIXON & HASLEY

By /s/ Henry Ingram
HENRY INGRAM

By /s/ Thomas C. Reed
THOMAS C. REED
900 Oliver Building
Pittsburgh, Pennsylvania 15222-5369
(412) 434-8600
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(C.A. No. 82-2712)

KEYSTONE BITUMINOUS COAL ASSOCIATION, a Pennsylvania unincorporated association of bituminous coal producers, individually and as represented by certain of its member companies; HELVETIA COAL COMPANY, a Pennsylvania corporation; ROCHESTER & PITTSBURGH COAL COMPANY, a Pennsylvania corporation; U.S. STEEL MINING CO., INC., a Delaware corporation, individually and as a trustee *ad litem* for KEYSTONE BITUMINOUS COAL ASSOCIATION; UNITED STATES STEEL CORPORATION, a Delaware corporation; and CONSOLIDATION COAL COMPANY, a Delaware corporation,

v.

Plaintiffs,

NICHOLAS DEBENEDICTIS, individually and in his capacity as Secretary of the Commonwealth of Pennsylvania, Department of Environmental Resources; PHILIP ZULLO, individually and in his capacity as Chief, Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources; and THOMAS B. ALEXANDER, individually and in his capacity as Chief, Section of Mine Subsidence Regulation of the Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources,

Defendants.

AFFIDAVIT OF H. DOUGLAS DAHL

COMMONWEALTH OF PENNSYLVANIA)

) ss:

COUNTY OF ALLEGHENY)

I, H. Douglas Dahl being duly sworn according to law depose and say as follows:

1. I am making this affidavit in connection with the above-captioned action and in support of a Motion for Summary Judgment filed by the plaintiff Consolidation Coal Company (Consol).

2. I am presently employed by Consol, one of the plaintiffs in the above-captioned action, as Executive Vice President, Engineering, Exploration and Environmental Affairs.

3. My current responsibilities includes management of the Engineering, Exploration and Environment Departments of Consol. I am a member of Consol's Management Committee and am also responsible for overseeing the planning, development and construction of all new Consol coal mining and related projects.

4. A copy of my vitae is attached to this affidavit as Exhibit "A".

5. At the request of our counsel in this matter and others, I have at various times caused reviews to be made of Consol's land records to determine the extent to which the coal beneath the surface property of others which has been, is being and will be mined at the Blacksville No. 1, Blacksville No. 2, Humphrey, Westland II, Renton, Laurel Montour No. 4 and Bailey Mines was severed from the surface ownership pursuant to instruments containing language like or similar to that contained in Joint Exhibits 4-12. The results of these reviews reveal that, with very limited exception, title and mining rights to the coal at these mines is held pursuant to instruments containing such language.

6. During the period from April, 1966 through December, 1983 at Blacksville No. 1, Blacksville No. 2, Humphrey, Renton, Laurel, Montour No. 4 and Westland II Mines, Consol has been or will be required to leave coal which it had and has the right to mine in place beneath at least 2231 structures and features listed in Section 4 of the Subsidence Act. Pursuant to DER's 50% rule

(which is explained as I understand it in paragraph 39 of the Stipulations of Counsel filed with this Court), Consol has been or will be required to leave support areas consisting of coal which it has the right to mine beneath each of these structures and features. Because of the DER's 50% rule, Consol has been or will be required to leave unmined *at least* 50% of the coal in each such support area. The practical effect of this is that it renders large blocks, perhaps even entire mine areas, unmineable by longwall mining techniques. The amount of coal which has been or will be left unmined in these support areas as a result of DER's 50% rule during this period totals *at least* 21,920,000 tons. Had it not been for Consol's ability to reach agreements with some surface owners, significant additional tonnage would have been left in place as a result of the DER's 50% rule. To the best of my knowledge, Consol has strictly adhered to the DER's 50% rule when mining beneath all Section 4 protected structures and features. The foregoing tonnage figure is a conservative estimate of the actual coal left unmined because of the DER's 50% rule. In many cases as a result of DER's 50% rule, Consol has been and will be forced to leave unmined additional amounts of its coal which abuts a support area. Consol has not been and will not be adequately compensated by the owner of any of these structures or features or by any other person for the true value of its coal required or caused by DER to be left unmined within and adjacent to these support areas. But for the application of the DER's 50% rule Consol would have mined and marketed this coal.

7. Our counsel and others also requested, at various times, that I cause field surveys to be made of the structures and features which overlay Consol's current longwall operations at Blacksville No. 1, Blacksville No. 2 and Humphrey Mines and the projected longwall operation at the Westland II Mine and have maps prepared which depict the location of these structures and features in relationship to Consol's current and next five (5) years

of projected mining activities. These maps were prepared and a copy of each has been submitted with this affidavit. See Dahl Affidavit Exhibits "B", "C", "D" and "E". A similar map was requested and prepared for Bailey Mine, a new longwall mine being developed by Consol. See Dahl Affidavit Exhibit "F".

8. Each map accurately depicts the location of the structures and features shown in relationship to Consol's current and next five (5) years of projected mining activities at Blacksville No. 1, Blacksville No. 2, Humphrey and Westland II Mine and the next fifteen (15) years at the Bailey Mine. Each map also depicts the size of a support area in the mine, (on a scale of one inch equals one thousand feet except for the Bailey Mine map which has a scale of one inch equals two thousand feet) for various structures and features calculated in accordance with the DER's 50% rule. The solid red areas depict the support areas which DER will require Consol to leave beneath dwellings. The solid brown areas depict the support areas which DER will require Consol to leave beneath cemeteries pursuant to Section 4 and Sections 89.145(a) and 89.146(b) of DER's Subsidence Regulations. The solid blue areas depict various surface bodies of water which DER will require Consol to support in accordance with the DER's 50% rule as required by Sections 89.145(a) and 89.145(b) of DER's Subsidence Regulations. In addition, Consol's Mines are overlain by hundreds of acres of surface land upon which the surface owners or speculators may decide to erect structures for which the right of surface support can also be reacquired pursuant to Section 15 of the Subsidence Act. The effect of Section 15 of the Subsidence Act is to give surface owners a private right of condemnation.

9. During the period beginning January 1, 1984 and ending December 31, 1988 the aforementioned longwall mining operations, except that at the Bailey Mine, which period will end in December, 1998, Consol will be re-

quired by DER to leave coal which it has the right to mine in each of the solid red, brown and blue areas shown on Dahl Exhibits "B", "C", "D", "E" and "F". For Blacksville No. 1, Blacksville No. 2, Humphrey and Westland II Mines, the amount of coal required to be left in place unmined will total at least 3,000,000 tons.

10. As noted in the Stipulations of Counsel, Consol has made use of longwall mining equipment and techniques. Also as noted in the Stipulations of Counsel, if the DER's 50% rule is imposed to provide support for a structure or feature on the surface and the calculated support area extends into a longwall panel, longwall mining many times cannot, as a practical matter, proceed beyond this point in the panel. Consequently, in addition to the coal within the support area, all remaining coal in the longwall panel many times cannot be mined through the use of longwall mining equipment and techniques. If this coal can be mined, it can only be mined at an extraordinary cost. Furthermore, this coal will remain unmined because Consol cannot justify the use of continuous mining equipment to recover it. The ultimate consequence of the application of DER's 50% rule is that it may render entire reserve blocks and mine areas uneconomical and, therefore, impractical to mine.

11. Consol currently has longwall mining equipment installed at Blacksville No. 1, Blacksville No. 2 and the Humphrey Mines. In a number of instances and for a variety of reasons projected longwall panels have been laid out at these mines beneath structures and features which are listed in Section 4 of the Subsidence Act. Because of the DER's 50% rule Consol will be required to leave coal which it had previously acquired and believed it had the right to mine in support areas within these projected longwall panel. The following figures represent the total estimated amount of coal which will be left unmined in projected panels at these mines over the next five years as a direct consequence of the 50% rule. But

for DER's 50% rule, Consol would mine and market this coal.

Blacksville No. 1—approximately 560,000 tons lost to "support" 10 dwellings

Blacksville No. 2—approximately 470,000 tons lost to "support" 5 dwellings and 1 cemetery

Humphrey—approximately 1,530,000 tons lost to "support" 22 dwellings and 3 cemeteries

Other coal will also be left in place at these mines in areas where continuous mining equipment is to be used for development of longwall panels. Consol will not be compensated by the owner of any of these structures or features for the true value of its coal required or caused by DER to be left unmined within and adjacent to these support areas.

12. As Dahl Affidavit Exhibits "B", "C", "D", "E" and "F" indicate longwall mining operations will also take place beneath a number of streams. If required to leave coal in support areas calculated in accordance with the DER's 50% rule beneath these surface features, Consol will lose additional tonnage it currently intends to mine and market without being compensated for its losses. At the Bailey Mine alone, if required to support only those streams designated as perennial by the United States Geologic Survey, Consol will, over the next 10 years, be required by DER's 50% rule to leave approximately 1,121,000 tons of coal in support areas which it otherwise has the right to mine.

13. In addition to losing the right to mine at least 50% of its coal beneath the structures and features discussed above in paragraphs 11 and 12, Consol is liable pursuant to Section 6 of the Subsidence Act and Section 89.147(b) of DER's Subsidence Regulations to either

compensate, repair or restore any damage which results from subsidence caused by mining.

14. Since 1966 Consol has been required to relinquish its right to mine all the coal beneath a number of Section 15 structures, and at least 255,967 tons of coal which it intended to mine and market was left in place as "protection for these structures. A review of Dahl Affidavit Exhibits "B", "C", "D", "E" and "F" indicates that there are a number of Section 15 structures which overlie Consol's projected mining activities. Consol does not wish to relinquish its rights to mine all the coal beneath these structures for any reason, even in return for receiving "compensation" from the owner of such structure because, as noted above, if the support area reacquired lies in the path of mining, longwall mining in that panel and possibly adjoining panels will become virtually impossible.

15. Once Consol leaves coal in place in support areas pursuant to DER's 50% rule, it is in virtually all situations impossible to ever mine such coal. Thus, unlike the coal which Consol leaves in place under other legal requirements and mining practices, as described in paragraphs 56-64 of the Stipulations of Counsel filed in this action, coal left in place to support surface structures or features under DER's 50% rule is of no use, benefit or value to Consol and, in certain circumstances, may render Consol's mining of other coal more difficult or impossible.

/s/ H. D. Dahl

Sworn and Subscribed to
this 4th day of November, 1983.

/s/ Dolores S. Peticco
DOLORES S. PETICCO
Notary Public
Pittsburgh, Allegheny County, Pa.
My Commission Expires Sept. 9, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, a Pennsylvania unincorporated association of bituminous coal producers, individually and as represented by certain of its member companies; HELVETIA COAL COMPANY, a Pennsylvania corporation; ROCHESTER & PITTSBURGH COAL COMPANY, a Pennsylvania corporation; U.S. STEEL MINING CO., INC., a Delaware corporation, individually and as a trustee *ad litem* for KEYSTONE BITUMINOUS COAL ASSOCIATION; UNITED STATES STEEL CORPORATION, a Delaware corporation; and CONSOLIDATION COAL COMPANY, a Delaware corporation,
Plaintiffs,

v.

NICHOLAS DEBENEDICTIS, individually and in his capacity as Secretary of the Commonwealth of Pennsylvania, Department of Environmental Resources; PHILIP ZULLO, individually and in his capacity as Chief, Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources; and THOMAS B. ALEXANDER, individually and in his capacity as Chief, Section of Mine Subsidence Regulation of the Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources,
Defendants.

AFFIDAVIT OF FRANK J. UCCIARDI

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF ALLEGHENY)

I Frank J. Ucciardi being duly sworn according to law depose and say as follows:

1. I am making this affidavit in connection with the above-captioned action and in support of a Motion for Summary Judgment filed by the plaintiffs.

2. I am employed as Vice President, Administration of Rochester & Pittsburgh Coal Company ("R&P") and Helvetia Coal Company ("Helvetia") two of the plaintiffs in this action.

3. As Vice President, Administration, my responsibilities include senior management and supervision of the Engineering and Land Departments of R&P, which service all of R&P's subsidiaries. The Engineering Department is responsible for all mine planning and projections and also administers all claims for damage allegedly caused by subsidence. The Land Department is the corporate custodian of records pertaining to coal lands owned or leased by R&P and its subsidiaries, including Helvetia.

4. At the request of our counsel in this litigation, Helvetia and R&P have caused to be made reviews of R&P's land and title records to determine the extent to which the coal beneath the surface property of others which has been, is being and will be mined at Helvetia's Lucerne No. 6, Lucerne No. 8 and Lucerne No. 9 Mines, was severed from the surface ownership pursuant to title documents containing language of similar import to that contained in Joint Exhibits 4-12. These reviews revealed that, with virtually no exception, title to all of the coal at these mines is held pursuant to title instruments containing the same language or language of similar import.

5. During the period from April, 1966 through December, 1983 at the Lucerne No. 6, Lucerne No. 8 and Lucerne No. 9 Mines, Helvetia has been, is being or will be required to leave in place coal, which R&P owns and which Helvetia has the right to mine, beneath at least 53 structures and features listed in Section 4 of the Subsidence Act. Pursuant to DER's 50% rule (which is explained in paragraph 39 of the Stipulations of Counsel

filed in this action), Helvetia has been, is being or will be required to leave in place in support areas coal, which it has the right to mine, beneath each of these structures and features. Because of DER's 50% rule, Helvetia has been or will be required to leave unmined *at least* 50% of its coal in each such support area. *At least* 339,000 tons of coal has been or will be left unmined in these support areas during this period. This tonnage figure is, however, a conservative estimate of the coal left unmined because of DER's 50% rule. As a direct consequence of complying with the rule, Helvetia has been and will be compelled to leave unmined other coal in or adjacent to support areas in its mines.

Neither R&P nor Helvetia have been or will be compensated by the owner of any of these structures or features or any other person for the value of the coal required or caused by DER to be left unmined within and adjacent to these support areas. But for the implementation and enforcement of DER's 50% rule, Helvetia would have mined and sold this coal.

6. Our counsel also requested, at various times, that Helvetia cause a field survey to be made of the surface structures and features which overlay projected underground mining activity of the Lucerne No. 6, Lucerne No. 8 and Lucerne No. 9 Mines in the next five years.

7. These surveys revealed that during the next five years of mining, commencing January 1, 1984 and ending December 31, 1988, Helvetia will be conducting mining operations beneath the following number of structures and features required to be protected by Section 4 of the Act and DER's Subsidence Regulations and policies:

- Lucerne No. 6—36 dwellings
numerous perennial streams
- Lucerne No. 8—16 dwellings
numerous perennial streams
- Lucerne No. 9—15 dwellings
1 cemetery
numerous perennial streams

In virtually all instances during this period, Helvetia will be required to leave the following minimum amounts of coal beneath these structures and features in support areas calculated in accordance with DER's 50% rule, which, but for the application of the rule, it has the right to mine:

Lucerne No. 6—approximately 88,800 tons in "support" areas beneath dwellings built before 1966.

Lucerne No. 8—approximately 40,500 tons in "support" areas beneath dwellings built before 1966.

Lucerne No. 9—approximately 206,000 tons in "support" areas beneath dwellings and a cemetery built before 1966.

But for requirement imposed by defendants, Helvetia would mine this coal.

8. Once Helvetia leaves coal in place in support areas pursuant to DER's 50% rule, it is in virtually all situations impossible to ever mine such coal. Thus, unlike the coal which Helvetia leaves in place under other legal requirements and mining practices, as described in paragraphs 56-64 of the Stipulations of Counsel filed in this action, coal left in place to support surface structures or features under DER's 50% rule is of no use, benefit or value to Helvetia and R&P and, in certain circumstances, may render Helvetia's mining of other coal more difficult or impossible.

9. During the period commencing January 1, 1984 and ending December 31, 1988, Helvetia will also be mining beneath other structures and features which are listed in Sections 89.145(a) and 89.146(b) of DER's Subsidence Regulations. In particular, Helvetia will be mining beneath numerous streams which the United States Geologic Survey has designated perennial streams. Because Helvetia conducts its underground mining operations rela-

tively close to the surface (the coal which it mines lies, on the average, between 350-400 feet below the surface), Helvetia will in all probability be required to leave in place coal which it otherwise has the right to mine and which it otherwise intends to mine beneath some or all of these perennial streams.

10. Because eventually the immediate roof and overlying strata may collapse into underground mine workings and because the pillars which will be left in place may eventually fail and subsidence will occur, Helvetia will, in that event, also become obligated pursuant to Section 6 of the Subsidence Act or Section 89.147(b) of DER's Subsidence Regulations, when damage occurs, to compensate for, repair or restore the resulting damage despite the fact that these surface owners could not otherwise enforce such claims because such claims have been waived or released in a binding manner in transactions by which the coal was severed from the surface.

11. In addition, the coal being mined by Helvetia at its Mines lies beneath hundreds of acres of surface lands upon which there exist structures or upon which the surface owners may decide to erect structures for which the surface support estate can be reacquired from R&P pursuant to Section 15.

/s/ Frank J. Ucciardi
FRANK J. UCCIARDI

Sworn to and subscribed
before me this 29th day
of November, 1983.

/s/ Barbara L. Sirinek
BARBARA L. SIRINEK
Notary Public
Pittsburgh, Allegheny County
My Commission Expires June 2, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, a Pennsylvania unincorporated association of bituminous coal producers, individually and as represented by certain of its member companies; HELVETIA COAL COMPANY, a Pennsylvania corporation; ROCHESTER & PITTSBURGH COAL COMPANY, a Pennsylvania corporation; U.S. STEEL MINING Co., INC., a Delaware corporation, individually and as a trustee *ad litem* for KEYSTONE BITUMINOUS COAL ASSOCIATION; UNITED STATES STEEL CORPORATION, a Delaware corporation; and CONSOLIDATION COAL COMPANY, a Delaware corporation,

v.

Plaintiffs,

NICHOLAS DEBENEDICTIS, individually and in his capacity as Secretary of the Commonwealth of Pennsylvania, Department of Environmental Resources; PHILIP ZULLO, individually and in his capacity as Chief, Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources; and THOMAS B. ALEXANDER, individually and in his capacity as Chief, Section of Mine Subsidence Regulation of the Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources,

Defendants.

AFFIDAVIT OF THOMAS J. USHER

COMMONWEALTH OF PENNSYLVANIA)
) ss:
COUNTY OF ALLEGHENY)

I, Thomas J. Usher, being duly sworn according to law, depose and say as follows:

1. I am making this affidavit in connection with the above-captioned action and in support of a Motion for Summary Judgment filed by the plaintiffs.

2. I am employed by U.S. Steel Mining Co., Inc. ("U.S.S.M."), one of the plaintiffs in this action as its President. As President of U.S.S.M., I serve as the chief operating officer of the coal mines in U.S.S.M.'s seven Districts located in the United States, including the Frick and Cumberland Districts, in Pennsylvania. My duties include general operating responsibility for the Cumberland District's Cumberland Mine, which is operating in the Pittsburgh Coal Seam in Greene County, Pennsylvania and the Frick District's Dilworth Mine operating in the Pittsburgh Seam in Greene County, Pennsylvania and the Maple Creek Mine operating in the Pittsburgh Coal Seam in Washington County, Pennsylvania.

3. At the request of our counsel in this matter and others, U.S.S.M. has at various times caused to be made by the Engineering Departments of the Frick and Cumberland Districts reviews of U.S.S.M.'s land and title records to determine the extent to which the Pittsburgh Seam coal beneath the surface property of others which has been, is being and will be mined at the Dilworth and Cumberland Mines was severed from the surface ownership pursuant to instruments containing language of similar import to that contained in Joint Exhibits 4-12. These reviews revealed that with virtually no exceptions, title to the Pittsburgh Seam coal at the Dilworth and Cumberland Mines is held pursuant to *instruments* containing such language. Although complete reviews of such records have not been made for the Maple Creek Mine, based on my knowledge of U.S.S.M.'s practices and procedures, I believe that that the Pittsburgh Seam coal being mined at the Maple Creek Mine is held pursuant to instruments containing language of similar import.

4. During the period from April, 1966 through December, 1983 at Maple Creek, Dilworth and Cumberland,

U.S.S.M. has been or will be required by DER to leave coal in place which it had and has the right to mine beneath at least 471 structures and features listed in Section 4 of the Subsidence Act. Pursuant to DER's 50% rule (which is explained in paragraphs 39 of the Stipulations of Counsel filed in this action), U.S.S.M. has been or will be required to leave in place in support areas coal, which it otherwise has the right to mine, beneath each of these structures and features. Because of the 50% rule, U.S.S.M. has been or will be required to leave unmined *at least* 50% of its coal in each such support areas. To my knowledge, U.S.S.M. has mined and, if required to in the future, will mine these support areas in strict compliance with DER's 50% rule. At least 3,405,650 tons of coal has been or will be left unmined in these support areas during this period. This tonnage figure is, however, a conservative estimate of the coal left unmined because of DER's 50% rule. In many cases, U.S.S.M. has been and will be forced to leave unmined other coal it has the right to mine in areas which abut a support area, because the presence of solid blocks of coal in the confined area of a mine often make it impossible to mine coal in or adjacent to the support area.

U.S.S.M. has not been and will not be compensated by the owner of any of these structures or features or by any other person for the value of the coal required or caused by DER to be left in place and unmined within and adjacent to these support areas or for any other damages suffered by U.S.S.M. or its parent, United States Steel Corporation ("U.S. Steel") as a result of leaving such coal in place or for related costs such as attorneys fees, etc.

But for the application of DER's 50% rule, U.S.S.M. would have mined this coal and transferred it to its parent, U.S. Steel for its consumption or sale to others. Unlike other coal U.S.S.M. leaves in place in its mines under the circumstances described in paragraphs 56-64 of

the Stipulation of Counsel filed in this action, coal left in place to support surface features or structures pursuant to DER's 50% rule has no value or use to U.S.S.M. or U.S. Steel.

5. To illustrate the facts contained in this affidavit, our counsel requested that I cause to have made by the Engineering Department of the Frick District a field survey of the structures and features which currently overlay the entire mine area at the Maple Creek Mines and Dilworth Mines and have prepared maps which depict the location of these structures and features in relationship to U.S.S.M.'s current and next five (5) years of projected mining activities. These maps were prepared and a copy of each has been submitted with this affidavit. See Usher Affidavit Exhibits "A" and "B".

6. Each map accurately depicts the location of the structures and features shown in relationship to U.S.S.M.'s current and next five (5) years of projected mining activities at Maple Creek and Dilworth. Many of these structures and features will be undermined within the next five years. Each map also depicts the size of support areas in the mine itself, (on a scale of 1" = 600') for various structures and features calculated in accordance with DER's 50% rule. The solid red areas which surround black squares depict the support areas which U.S.S.M. in virtually all instances, will be required to leave beneath dwellings built before April 27, 1966 pursuant to Section 4 of the Subsidence Act and/or all public buildings pursuant to Section 89.145(a) and 89.146(b) of DER's Subsidence Regulations. The solid blue areas depict support areas calculated in accordance with the 50% rule which U.S.S.M. will, in some situations, be required to leave beneath perennial streams and certain impoundments pursuant to Sections 89.145(a) and 89.146(b) of DER's subsidence regulations. Also shown on each map in orange or purple is the amount of coal which U.S.S.M. currently intends to leave in place as barrier or

safety zone coal and in, in green, the amount of coal U.S.S.M. may elect or be required to leave in place around oil and gas wells. Support areas are also shown in brown for roads and in yellow for gas and power transmission lines. Prior to the Suspension Order issued by defendant DeBenedictis in July of 1983, which is discussed in paragraph 23 of the Stipulations of Counsel, the defendants intended to require that mining beneath roads and utility lines to be automatically subject to the 50% rule.

7. The red cross-hatched areas depict support areas calculated in accordance with the 50% rule beneath surface areas where the owner can reacquire the surface support estate with respect to land on which there exists structures or features described to Section 15 of the Subsidence Act. In addition to the red cross-hatched areas, the Maple Creek and Dilworth and Cumberland Mines are overlain by several thousands of acres of surface lands upon which surface owners may decide to erect structures for which the surface support estate may be reacquired pursuant to Section 15 of the Subsidence Act.

8. During the period beginning January 1, 1984 and ending December 31, 1988 at Maple Creek and Dilworth, U.S.S.M., in virtually all instances, will be required to leave coal which it has the right to mine in each of the solid red areas shown on Usher Affidavit Exhibits "A" and "B". The amount of coal which will be left unmined in these solid red support areas is estimated to exceed 600,000 tons. This figure is also a conservative estimate because, as noted above in paragraph 4, complying with the 50% rule often results in other coal becoming unmineable. U.S.S.M. will not be compensated by the owner of any of these structures for features or by any other person for the value of its coal required or caused by DER to be left unmined within and adjacent to these support areas. But for defendant's actions in requiring compliance with DER's 50% rule, U.S.S.M. would mine this coal and transfer it to U.S. Steel for use or sale to others.

9. During the period beginning January 1, 1984 and ending December 31, 1988 at Maple Creek and Dilworth, U.S.S.M. will also be required to leave coal which it was the right to mine in each of the solid blue areas shown on Usher Affidavit Exhibit ""A" and "B" unless U.S.S.M. can demonstrate to DER that its mining activities beneath perennial streams and impoundments containing at least 20 acre feet *will not* cause any subsidence damage. U.S.S.M. will not be able to make this showing in all cases; as a result, coal which it has the right to mine will be left unmined. U.S.S.M. will not be compensated by the owner of these features or any other person for the value of the coal left unmined within and adjacent to these support areas. But for defendants' actions in requiring compliance with DER's 50% rule U.S.S.M. would mine this coal and transfer it to U.S. Steel for use or sale to others.

10. In addition to losing its right to mine all the coal required to be left unmined as support for the structures and features discussed above in paragraphs 8 and 9, U.S.S.M. will also become liable pursuant to either Section 6 of the Subsidence Act or Section 89.147(b) of DER's Subsidence Regulations for all the damage to these structures and features which will eventually result from its mining activities beneath them. This liability will be (as it has been in the past) imposed even though U.S.S.M. mines in strict adherence to DER's 50% rule and despite the fact that the owner of the structure or feature does not have, but for Section 6 or 89.147(b), the right to make a claim for subsidence damage against U.S.S.M.

11. During the period beginning January 1, 1985 and ending December 31, 1989, U.S.S.M., in virtually all instances, will also be required to leave coal in place, which it otherwise has the complete right to mine, in its Cumberland Mine beneath 29 Section 4 Structures under DER's 50% rule. The amount of coal left in place and

unmined will exceed 1,300,000 tons. The other requirements described in paragraphs 7, 8, 9 and 10, and depicted on Usher Exhibits "A" and "B" for purposes of illustration are also applicable to the Cumberland Mine.

12. In the past, U.S.S.M. has been required to pay in excess of \$150,000 in damages to persons whose structures were undermined in accordance with DER's 50% rule in direct response to claims filed pursuant to Section 6 of the Subsidence Act. In other instances U.S.S.M. "settled" with the owners of structures and features listed in Section 4 before any Section 6 claim was filed.

13. There is no question that such claims will be made, the only question is when. The "protection" afforded surface structures and features by the 50% rule or any partial extraction mining technique is only temporary. Every recognized expert on the subject of mine subsidence with whom U.S.S.M. is familiar agrees that complete prevention of surface subsidence through partial mining is virtually impossible. This is particularly true at the Maple Creek and Dilworth Mines because the texture and structure of the coal pillars in support areas is such that the pillars will eventually be weakened and eroded by exposure to air and water. Over a period of time the pillars will deteriorate, lose bearing strength and crush out causing the surface above the pillars to subside. Because it is very unlikely that the pillars in a support area would crush out uniformly, the surface over the support area will be exposed to considerable horizontal strain and the surface movement will not be uniform. The resulting surface damage is often severe.

14. Since October 10, 1980, U.S.S.M. has received 36 demands to reacquire the right of surface support from persons who own Section 15 structures above the Maple Creek and Dilworth Mines. As evidenced by their demands, none of these persons own the surface support estate. In addition, none of these persons can presently preclude U.S.S.M. from defending a claim for subsidence

damage caused as a result of its removal of the support estate. Thirty-three of these requests were made by private home owners and three were made by private business owners.

15. U.S.S.M. does not wish to relinquish its right to mine all the coal beneath these structures without liability for any subsidence damage its activities may cause. Instead, consumption or sale to others the coal beneath and adjacent to these Section 15 Structures without being compelled to leave any support pillars of coal in place. Nevertheless, in virtually all instances, U.S.S.M. will be forced to relinquish (as it has been forced to do on previous occasions) its rights and become obligated to leave coal unmined beneath these structures which it had otherwise planned to mine. In addition, U.S.S.M. will also become liable for the subsidence damage which will occur when the pillars left in place deteriorate and crush out.

/s/ Thomas J. Usher
THOMAS J. USHER

SWORN TO AND SUBSCRIBED BEFORE ME THIS
29TH DAY OF NOVEMBER, 1983.

/s/ Margaret A. Barna
MARGARET A. BARNA
Notary Public
Pittsburgh, Allegheny County
My Commission Expires June 2, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, a Pennsylvania unincorporated association of bituminous coal producers, individually and as represented by certain of its member companies; HELVETIA COAL COMPANY, a Pennsylvania corporation; ROCHESTER & PITTSBURGH COAL COMPANY, a Pennsylvania corporation; U.S. STEEL MINING CO., INC., a Delaware corporation, individually and as a trustee *ad litem* for KEYSTONE BITUMINOUS COAL ASSOCIATION; UNITED STATES STEEL CORPORATION, a Delaware corporation; and CONSOLIDATION COAL COMPANY, a Delaware corporation,
Plaintiffs,

v.

NICHOLAS DEBENEDICTIS, individually and in his capacity as Secretary of the Commonwealth of Pennsylvania, Department of Environmental Resources; PHILIP ZULLO, individually and in his capacity as Chief, Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources; and THOMAS B. ALEXANDER, individually and in his capacity as Chief, Section of Mine Subsidence Regulation of the Division of Mine Subsidence of the Bureau of Mining and Reclamation of the Commonwealth of Pennsylvania, Department of Environmental Resources,
Defendants.

STIPULATIONS OF COUNSEL

Pursuant to this Honorable Court's Order dated October 17, 1983 as modified by an Order dated November 15,

1983, the parties by and through their respective counsel hereby submit the following joint stipulations for use by this Honorable Court in deciding any motions for partial summary judgment which may be filed:

I.

Introduction

1. This is a civil rights action which seeks to have declared unlawful and enjoined certain provisions of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act ("Subsidence Act"), Act of April 27, 1966, P.L. 31, Spec. Sess. No. 1, *as amended*, October 10, 1980, P.L. 874, No. 156, 52 P.S. § 1406.1 *et seq.* (Supp. 1983) and certain regulations and policies which implement the Subsidence Act ("Subsidence Regulations"). The Subsidence Act, the Subsidence Regulations and policies of the defendants constitute Pennsylvania's Subsidence Control Program. The challenged provisions are alleged to deprive plaintiffs of rights guaranteed them by the Constitution of the United States.

II.

Parties

2. Plaintiff, Keystone Bituminous Coal Association ("KBCA"), is a Pennsylvania unincorporated, non-profit association with its principal office in Dauphin County, Pennsylvania, whose members are corporations and partnerships engaged in the mining of bituminous coal. The members of Keystone produce annually between 35 and 45 million tons of coal representing fifty percent of the bituminous coal mined in Pennsylvania and the vast majority of bituminous coal mined by complete extraction underground mining methods. Keystone members own substantial coal reserves beneath the surface and subsurface properties of others.

3. Plaintiff, Helvetia Coal Company ("Helvetia"), is a Pennsylvania corporation and a wholly-owned subsidiary of plaintiff, Rochester & Pittsburgh Coal Company ("R&P"). Helvetia engages in underground coal mining operations in the Western District of Pennsylvania. Helvetia leases and/or controls substantial underground bituminous coal reserves beneath the surface and subsurface property of others in this District.

4. Plaintiff, R&P, is a Pennsylvania corporation which owns, leases and/or controls substantial coal reserves beneath the surface and subsurface property of others in this District. R&P does not engage directly in coal mining operations. Instead, certain of its properties are being mined by Helvetia. R&P has joined in this litigation because it owns, leases and/or controls the coal which is mined by Helvetia.

5. Plaintiff, U.S. Steel Mining Co., Inc. ("U.S.S.M."), is a Delaware corporation, a member of Keystone and a wholly-owned subsidiary of plaintiff, United States Steel Corporation ("U.S. Steel"). U.S.S.M. engages in underground coal mining operations in the Western District of Pennsylvania. U.S.S.M. controls substantial coal reserves beneath the surface and subsurface property of others in this District.

6. Plaintiff, U.S. Steel, is a Delaware corporation which owns, leases and/or controls substantial coal reserves beneath the surface and subsurface property of others in this District including the coal reserves being mined by U.S.S.M. U.S. Steel does not engage directly in coal mining operations. Instead, it owns leases and/or controls coal which is mined by U.S.S.M. pursuant to operating agreements.

7. Plaintiff, Consolidation Coal Company ("Consol"), is a Delaware corporation which by itself or through affiliates engages in underground coal mining operations in the Western District of Pennsylvania, and also owns,

leases and/or controls substantial coal reserves beneath the surface and subsurface property of others in this District.

8. Defendant, Nicolas DeBenedict, is Secretary of the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), a resident of the Middle District and the individual responsible for the overall administration and enforcement of the Commonwealth's programs which regulate bituminous underground coal mining.

9. Defendant, Philip Zullo is Chief of DER's Division of Mine Subsidence, a resident of the Middle District and the individual responsible for the general administration and enforcement of Pennsylvania's Subsidence Control Program.

10. Defendant Thomas B. Alexander is Chief of DER's Section of Mine Subsidence Regulation, a resident of this District and the individual responsible for the day-to-day administration and enforcement of Pennsylvania's Subsidence Control Program. Mr. Alexander is authorized and empowered to issue orders and other directives to underground mine operators concerning their compliance with the provisions of Pennsylvania's Subsidence Control Program. Mr. Alexander is also authorized and empowered to determine whether an underground mine operator is entitled to a Subsidence Permit as well as amendments and revisions to such permits. Mr. Alexander also is directly responsible for determining whether certain maps and other submissions made by underground operators meet the requirements of Pennsylvania's Subsidence Control Program.

III.

Statutory and Regulatory Framework

11. The Federal Surface Mining Control and Reclamation Act ("SMCRA") was enacted August 3, 1977. It

sets standards regarding surface mining and the surface effects of subsurface mining, and authorizes the Secretary of the Interior to issue implementing regulations further specifying those standards.

12. The Secretary of the Interior has promulgated permanent federal subsidence regulations, 44 Fed. Reg. 14,902 (March 13, 1979)); and revised these permanent regulations on June of 1983, (48 Fed. Reg. 24,638 (June 1, 1983)).

13. Legal challenges to the federal interim regulations, the federal initial permanent regulations, and to the revised federal permanent regulations have been filed in the district court of the District of Columbia pursuant to Section 526(a) of SMCRA, 30 U.S.C. § 1276(a). *See In Re Surface Mining Regulations Litigation*, 452 F. Supp. 327 (D.C.C., 1978) (subsequent history omitted); *In Re Permanent Surface Mining Litigation*, No. 29-1144 (D.D.C., February 26, 1980) (subsequent history omitted)); and *National Coal Association v. Department of Interior*, No. 83-1953 (D.D.C., filed July 8, 1983).

14. Section 503 of the SMCRA, 30 U.S.C. § 1253, allows states to assume primary jurisdiction over the regulation of surface coal mining and reclamation operations within their state. The acquisition of this jurisdiction is known as "primacy". It is granted by the Secretary of the Interior upon a finding that "such state has the capability of carrying out the provisions of this chapter and meeting its purposes. . . ." A state regulatory authority can assume primary jurisdiction over the surface effects of underground mining activities if it submits a program of statutes and regulations approved by Secretary of the Interior which meets all the applicable requirements of SMCRA and the federal regulations. *See* 30 C.F.R. § 701.4(a). States are statutorily free to impose more stringent standards and controls than SMCRA and the federal regulations. *See* 30 U.S.C. § 1255. Pennsylvania has imposed subsidence control re-

quirements which are more stringent than those required by SMCRA and the federal regulations, *e.g.*, Pennsylvania prohibits subsidence damage to a broader category of structures and features.

15. Until a state secures primacy, the federal government enforces the standards under SMCRA. 30 U.S.C. §§ 1252(e), 1254(a)(1) and (2). Similarly, if a state, once granted primacy, fails to implement the program satisfactorily, the federal government must develop and implement a program. 30 U.S.C. § 1254(a)(3).

16. The Subsidence Act was enacted on April 27, 1966. It was amended in 1980. *See* Act of October 10, 1980, P.L. 874, No. 156.

17. Pennsylvania applied for primacy initially on February 26, 1980. That application was disapproved. 45 Fed. Reg. 69,971 (Oct. 22, 1980). Pennsylvania was to submit its revised application on December 22, 1980.

18. On November 26, 1980, the Pennsylvania Coal Mining Association, a trade association representing portions of the coal industry, secured an injunction against Pennsylvania's applying for primacy. *See PCMA v. DER*, No. 2718 C.D. 1980 (Pa. Cmwlth. Ct., 11/28/80) *appeal dismissed as moot*, 444 A.2d 637 (1982).

19. The primacy submission ultimately made to the Secretary of the Interior included the state statute at issue here, and the state regulation at issue here as they existed prior to the partial suspension as described in Paragraph 23 below. The suspension of those regulations reduced the subsidence control requirements imposed upon the coal industry.

20. On July 30, 1982, the Secretary of the Interior conditionally approved Pennsylvania's Subsidence Control Program, thus granting Pennsylvania primacy. 47 Fed. Reg. 33081 (July 30, 1982).

21. Pursuant to Section 526(a) of the SMCRA, 30 U.S.C. § 1267(a), Pennsylvania Coal Mining Association filed an action in the Middle District of Pennsylvania on September 10, 1982 against the Secretary of the Interior challenging his action in conditionally approving Pennsylvania's primacy application. See *PCMA v. Watt*, 562 F. Supp. 741 (M.D. Pa., 1983).

22. That challenge was granted in part and dismissed in part by opinion and order on April 20, 1983.

23. Following the Secretary of the Interior's revision of the federal Subsidence Regulations, as published in the Federal Register of June 1, 1983, Pennsylvania suspended portions of its subsidence regulations. See 13 Pa. Bull. 2060 (July 2, 1983) and Stipulation of Parties in this action dated June 24, 1983.

24. Section 4 of the Subsidence Act prohibits mining which causes subsidence damage to the following categories of structures and features ("Section 4 Protected Structures"), if in place on April 27, 1966, the effective date of the Act:

(a) public buildings and non-commercial structures customarily used by the public including, but not limited to, churches, schools, hospitals and municipal utilities of municipal public service operations;

(b) occupied dwellings; and

(c) cemeteries.

The department applies a formula, subject to limited exceptions, requiring 50% of the coal beneath Section 4 Protected Structures to be left in place as a means of providing surface support. This "50% rule" is described in more detail in Paragraph 39 below. Once coal has been left in place beneath Section 4 Protected Structures in accordance with the 50% rule, plaintiff companies have not been able to recover it thereafter and as a prac-

tical matter will not be able to do so absent extraordinary circumstances.

25. As part of the primacy submission approved by the Secretary of the Interior, the prohibition against mining which causes subsidence damage and the 50% rule was extended to additional classes of buildings and surface features beyond those set forth in Section 4 of the Subsidence Act as follows:

(a) public buildings and non-commercial buildings customarily used by the public after April 27, 1966, including churches, schools, hospitals, courthouses, and government offices;

(b) impoundments of water with the storage volume of 20 acre feet or more and perennial streams;

(c) aquifers which serve as a significant source of water for a public water system; and

(d) coal refuse disposal areas.

See 25 Pa. Code § 89.145(a) and § 89.146(b).

26. Section 15 of the Subsidence Act gives surface owners who own or decide to build structures which are not protected by Section 4 ("Section 15 Structures") and who desire to prevent subsidence damage, the right to purchase the amount of coal necessary for such protection.

27. DER does not involve itself in the issue of whether or how much support coal is needed to protect Section 15 Structures.

28. Since the owner of a Section 15 Structure has re-acquired ownership of the support coal and right of support, a coal operator cannot remove coal which the owner of a Section 15 Structure has acquired pursuant to Section 15.

29. Pursuant to Section 15, the owner of the coal is to receive compensation for value of the support coal being acquired.

30. The 50% rule has been applied by DER to underground coal mining beginning in 1966, following passage of the Subsidence Act. Initially, guidelines describing it were distributed to mine operators; it is now described in regulations, 25 Pa. Code 89.146(b).

31. The 50% rule is the general rule applied by DER to prevent subsidence damage. Alternative methods, *e.g.*, leaving less coal in place and/or in a different configuration of pillars may be used if it is demonstrated by the operator that they will prevent subsidence damage, § 89.146(b)(4), or, subject to additional limitations, if the operator demonstrates that subsidence damage is "unlikely", § 89.146(c). Absent such demonstration the 50% rule must be followed. Furthermore, if these measures fail to prevent subsidence damage, more stringent measures may be imposed or mining may be prohibited. *See* 25 Pa. Code § 89.146(b)(4).

32. Section 6 of the Subsidence Act requires mine operators to repair or compensate for any subsidence damage caused to a Section 4 Protected Structure. Section 15(b) of the Subsidence Act, 52 P.S. § 1406.15(b) imposes a comparable obligation as to Section 15 Structures.

33. 25 Pa. Code § 89.147(b) requires mine operators to restore surface land to its premining condition whenever underground mining activity reduces the reasonably foreseeable uses of surface land, to the extent economically and technologically feasible.

34. Section 6 requires an operator to repair or compensate for damage to Section 4 Protected Structures and 25 Pa. Code § 89.147(b) requires an operator to restore surface land even though he mined in conformity with the 50% rule or a DER approved alternative method.

IV.

Mine Subsidence

35. The phenomenon known as coal mine subsidence is the lowering of strata overlying a coal mine, including the surface, due to underground coal extraction.

36. The extent and timing of substance depends upon, among other things, the depth of mining, the geologic character of the overlying strata, the topography of the surface and the technique of coal removal employed.

37. Plaintiffs believe subsidence will occur whenever coal is removed by underground mining methods.

38. DER concurs that even with 50% mining, some subsidence will occur eventually. However, DER believes further that the support provided by the 50% rule will last in almost all cases at least for the life of the structure being protected.

39. Under the 50% rule, at least 50% of the coal in a support area beneath a structure is left in place (not mined) in the form of pillars to support the surface. The support area is determined by measuring on the surface 15 feet outwards from each side of the structure ("safety zone") and projecting a 15° line from that area to the coal seam ("angle of draw"). *See* Joint Exhibit 1. The amount of coal required to be left unmined is a function of building size, depth of the coal being mined and thickness of the coal seam being mined. As the depth of cover increases the size of the support area increases. *See* Joint Exhibit 2. When two or more structures or features entitled to the protection of the 50% rule are in close proximity, mining under the area between them must be conducted under the 50% rule.

40. This formula was developed and is applied by DER because in 1966, and presently, its professionals believed that it was and is the most effective method to support surface structures.

41. Since 1966, approximately 14,000 Section 4 Protected Structures have had mining conducted under them subject to the 50% rule. Some of these structures were undermined by plaintiffs who were therefore required to leave coal in place.

42. Of those 14,000, DER has received subsidence damage claims on approximately 300.

V.

General Background On Mining Methods Currently Used In Western Pennsylvania By Plaintiffs

43. There are two full extraction coal mining methods currently in use in Western Pennsylvania, the room and pillar method and the longwall method. In both methods, a portion of the mine is devoted to "mains and sub-mains" which are used to provide access to the mine for miners, materials, supplies, power and for ventilation of the mine. The mains and sub-mains are substantially similar in size and layout whether the mining method used is longwall or room and pillar mining. See Joint Exhibit 3.

44. In the main and sub-main areas, about 40% of the coal is extracted; the rest is left in place in the form of support pillars designed to protect the mine during mining activity.

45. Areas of the mine where coal extraction is taking place may be referred to as "mining panels."

46. The room and pillar method of mining involves the use of "continuous mining equipment" and it is accomplished in two phases, development mining and retreat mining. During the development phase of a room and pillar mine, pillars of coal are left in a pre-planned pattern throughout a block of coal. This is done to provide support for the roof of the mine and to facilitate the safe ingress and egress of workers and equipment

to and from the mining areas, the movement of air throughout the mine, and the efficient transportation of coal out of the mine to the surface.

47. Upon completion of development mining in a particular mining panel, the coal pillars which have been left in place are systematically removed. Operators seek to remove as many pillars as they can consistent with safe and efficient mining.

48. In the experience of Consol, within a mining panel, approximately 75% of the coal is removed under the room and pillar method.

49. The longwall method of mining involves the use of both continuous mining equipment and longwall mining equipment, and also involves two phases, development mining and panel extraction.

50. For longwall mining, the mining area is laid out in a series of parallel panels, which will be mined by the longwall mining equipment, separated by development entries. See Joint Exhibit 3.

51. Longwall mining panels are from 400 to 700 feet in width, with Consol's being about 600 feet. The panels may be from 3,000 to 9,000 feet in length; Consol's are planned to be approximately 6,000 feet.

52. The development entries are the same length as the panels, and 150 to 200 feet in width.

53. Mining in the development entries of a longwall mining operation resembles the development phase of room and pillar mining. The difference is that the pillars are rarely pulled as is the case in the retreat mining phase of a room and pillar operation.

54. In Consol's experience, approximately 35% of the coal in the longwall panel entries is recovered and 100% of the coal is recovered in the panel areas of a longwall mine; resulting in roughly the same percentage of extraction as occurs in a room and pillar mine.

55. As the longwall mining machine advances through the solid coal in the longwall panel, taking 100% of the coal out of the panel, the roof of the longwall panel collapses behind the machine, causing subsidence. If an operator is required to leave support coal in place to protect a surface structure or feature and this coal lies in a longwall panel, longwall mining cannot, as a practical matter, proceed beyond this point in the panel.

56. A variety of engineering and safety reasons, or legal requirements not challenged in this lawsuit, require coal to be left behind and not mined. Some of these reasons are described in succeeding paragraphs.

57. Blocks of coal, known as "barrier coal", are left in place between different mines and within areas of a single mine for safety and to reduce operating costs. This coal helps to prevent the water and gas from adjacent mines or completed mining areas from entering the active mining areas and to protect the mains and submains.

58. Barrier coal has always been left in place regardless of whether room and pillar or longwall mining methods are being employed.

59. Barrier coal is left in place for purposes of safety, and is not a subsidence-related requirement.

60. A Pennsylvania statute not challenged in this litigation, the Gas Operations Well-Drilling Petroleum and Coal Mining Act, 52 P.S. § 2101 *et seq.*, requires that coal be left in place in a 300-foot radius around the casings of oil and gas wells.

61. Typically, the oil or gas deposit will be below the coal seam, and the well will penetrate through the coal seam.

62. Coal is left in place in the mine around these wells to prevent a rupture of the well which would endanger safe mining operations and disrupt the supply of oil and gas to the surface.

63. Coal is left around active and inactive unplugged wells regardless of whether longwall or room and pillar mining is employed.

64. Another state mine safety statute not challenged in this litigation, 52 P.S. § 3101 *et seq.*, requires coal to be left in place beneath and adjacent to certain large surface bodies of water.

65. The lowering of the strata and the surface due to subsidence can result in damage to structures and surface features overlying the mine.

66. The longwall mining method is a relatively new technique.

67. Consol first engaged in longwall mining in Pennsylvania in the early 1970's in an existing mine located in a sparsely populated area. Consol made a major planning commitment to longwall mining in the mid 1970's. It is now planning a series of new mines in Washington and Greene Counties in Pennsylvania, known collectively as the "Bailey Mines", some of which are in development and all of which will be mined into the 21st Century. All of those mines are planned as longwall mines.

68. Consol began planning for the Bailey No. 1 Mine in May of 1980. Final acquisition of the property rights for the mine was completed in January of 1981. Consol has not yet purchased the longwall mining machines which would be used in the Bailey Mines but has budgeted the necessary funds.

69. U.S.S.M. began longwall mining later than Consol. Helvetia does not use longwall mining at the present time.

V.

General Background On Coal Ownership In The Western Pennsylvania Coal Fields

70. Beginning well over 100 years ago, landowners began conveying away or severing title to the coal and

the right of surface support while retaining ownership of the surface estate. Approximately 90% of the coal now being and to be mined by underground mining methods by the plaintiff companies in Western Pennsylvania was severed from the surface in the period from 1890 through 1920.

71. In Western Pennsylvania, various deed provisions have been from time to time commonly used in the transactions described above. Joint Exhibit 4 through 12 are representative of the language used in such deed provisions.

Respectfully submitted,

ROSE, SCHMIDT, DIXON & HASLEY

By

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By

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OFFICE OF THE ATTORNEY GENERAL

By /s/ Robert B. Hoffman
ROBERT B. HOFFMAN
Counsel for Defendants

JOINT EXHIBIT 4

THIS INDENTURE,

Made the 19th day of October in the year of our Lord one thousand nine hundred and ten, Between Caroline Repine, widow, J. D. Repine and Lizzie Repine, his wife, Frank B. Repine and Mary V. Repine, his wife, all of the township of Blacklick, County of Indiana and State of Pennsylvania, M. J. Repine and Melissa Repine, his wife, of the Borough of Wilkinsburg, County of Allegheny and State aforesaid, Maude M. Pounds, formerly Repine, and William Pounds, her husband, of the Borough of Blairsville, County of Indiana and State of Pennsylvania, being the widow and surviving children and heirs, or persons intermarried with the same, of Joseph M. Repine, late of Blacklick township, deceased, and heirs of A. L. Repine, deceased, parties of the first part AND B. M. Clark, trustee, of the Borough of Punxsutawney, County of Jefferson and State aforesaid, party of the second part: Witnesseth, that the said parties of the first part, for and in consideration of the sum of Ten thousand three hundred and fifty Dollars, lawful money of the United States of America unto them well and truly paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, convey and confirm unto the said party of the second part, his heirs and assigns, All the coal in, upon and under that certain piece or parcel of land situate in the township of Blacklick in the County of Indiana and State of Pennsylvania, bounded and described as follows, viz:

BEGINNING at stone corner of land of John Repine and land of William Taylor; thence by land of William Taylor North forty nine degrees fifteen minutes East

one hundred and fifty four and five tenth perches to stone; thence by land of William Taylor and land of the heirs of James Gibson, North sixty nine degrees East thirty seven and three tenth perches to post; thence by land of the heirs of James Gibson, North five minutes East one hundred and five and seven tenth perches to hickory; thence by land of the heirs of William Gibson, North twenty seven degrees West fifty and two tenth perches to stone; thence by land of Harvey Gibson, South thirty one degrees ten minutes West seventy two and six tenth perches to stone at the side of the public road; thence along the public road and by land of Harvey Gibson, North sixty four degrees twenty five minutes West forty seven and seven tenth perches to stone in road; then by land of Harvey Gibson, South thirty two degrees thirty minutes West thirty one and nine tenth perches to post; thence by the same, North eighty four degrees thirty minutes West twelve and two tenth perches to post; thence by land of Mrs. Reed, South fourteen degrees fifteen minutes West thirty one and eight tenth perches to post, thence by the same, North seventy four degrees forty five minutes West forty three and seven tenth perches to stone beside the road; thence along the public road and by land of Laughlin heirs, South six degrees fifteen minutes East twenty one and six tenth perches to post in center of road; thence by same, South four degrees East eleven and three tenth perches to stone in road; thence through the center of said road and by lands of John Repine the following courses and distances, South fourteen degrees fifteen minutes West six and four tenth perches; South twenty five degrees fifteen minutes West twelve and two tenth perches; South thirty two degrees thirty minutes West seventeen and five tenth perches; South nineteen degrees fifteen minutes West nine and three tenth perches; South seven degrees forty five minutes East nine and three tenth perches; South two degrees thirty minutes West nine perches; South twenty two degrees thirty minutes West eight and four tenth perches to stone in road;

thence South thirty degrees five minutes East eighty eight and eight tenth perches to stone, the place of beginning, CONTAINING one hundred and seventy two and five tenth acres.

Being the coal under the same tract of land which became vested in Joseph M. Repine by deed of the heirs of James Gibson dated March 29, 1890, recorded in Deed Book "B" Vol. 52, page 406, and the said Joseph M. Repine having died September 15, 1909 intestate, the same descended to and became vested in Caroline Repine, widow, J. D. Repine, F. B. Repine, M. J. Repine, Maude Pounds, formerly Repine, and A. L. Repine under the intestate laws of the Commonwealth of Pennsylvania. The said A. L. Repine afterwards died, to wit: April 16, 1910 and his interest in said tract of land vested in the parties of the first part to this deed under the intestate laws of the Commonwealth of Pennsylvania.

TOGETHER with the right of way into, upon and under said lands for the purpose of examining, testing, mining and removing said coal from this date, and other coal now owned or that may hereafter be acquired by the said second party, his heirs and assigns, together with the right to locate and erect such chutes, tipples, buildings, and other structures as may be necessary for the use and working of mines, and with the right to deposit dirt therefrom upon the surface and with all mining rights and privileges necessary and convenient in the mining, digging, removing and transporting said coal, or coal from other lands, and for these purposes to build roads and drains upon or under the surface of said lands, and without liability for any and all damages done to said lands or the buildings or waters therein or thereon.

To have and to hold the said coal, mining rights &c. and the rights, privileges, hereditaments and premises hereby granted or mentioned and intended so to be, with

the appurtenances, unto the said party of the second part, his heirs and assigns, to and for the only proper use and behoof of the said party of the second part, his heirs and assigns forever.

And the said parties of the first part, their heirs, executors and administrators, do by these presents, covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that they the said parties of the first part, and their heirs, all and singular the hereditaments and premises hereinabove described and granted or mentioned and intended so to be, with the appurtenances, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against them the said parties of the first part, their heirs, and against all and every other person or persons whomsoever, lawfully claiming or to claim the same or any part thereof, shall and will warrant and forever defend.

In Witness Whereof, the said parties of the first part have to these presents set their hands and seals. Dated the day and year first above written.

Sealed and Delivered
in the presence of

/s/ Caroline Repine [SEAL]

/s/ [Illegible] as to M. J. Repine and Melissa Repine

/s/ J. D. Repine [SEAL]

/s/ Lizzie Repine [SEAL]

/s/ [Illegible] as to Caroline Repine, J. D. Repine, Lizzie Repine, Frank B. Repine & Mary V. Repine

/s/ Frank B. Repine [SEAL]

/s/ Mary V. Repine [SEAL]

/s/ Maud M. Pounds [SEAL]

/s/ M. J. Repine [SEAL]

/s/ William Pounds [SEAL]

/s/ Melissa Repine [SEAL]

JOINT EXHIBIT 5

THIS INDENTURE,

Made the 21st day of October in the year of our Lord one thousand nine hundred and twenty, Between ALBERT L. COLEMAN and LOTTIE M. COLEMAN, his wife, ADA C. McCLELLAND and HOWARD J. McCLELLAND, her husband, and WILLIAM S. COLEMAN (single), all of the Township of Conemaugh, County of Indiana and State of Pennsylvania, BELLE M. VAN HORN and GEORGE VAN HORN, her husband, of the Borough of Walden, County of Jackson and State of Colorado, JENNIE MAY WOLF and VERNER U. WOLF, her husband, of the Borough of Fort Collins, County of Larimer and State of Colorado, and PAUL COLEMAN (Single), of the Borough of Wilkinsburg, County of Allegheny and State of Pennsylvania, being all of the heirs of J. N. Coleman, deceased, parties of the first part, and B. M. CLARK, TRUSTEE, of the Borough of Punxsutawney, County of Jefferson and State of Pennsylvania, party of the second part.

WITNESSETH, that the said parties of the first part, for and in consideration of the sum of FORTY TWO THOUSAND FIVE HUNDRED AND SEVENTY FIVE (\$42,575.00) DOLLARS, lawful money of the United States of America unto them well and truly paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed, and, or confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, convey and confirm unto the said party of the second part, his successors and assigns, ALL THE COAL of whatever kind lying or being in or upon all that certain tract of land situate in the Township of Conemaugh, County of Indiana and State of Pennsylvania, bounded and described as follows:

BEGINNING at an ash, being the north-east corner of the tract herein described; thence by land of J. A. Compton North seventy seven degrees fifty six minutes West two thousand eighty five and three tenths (N.77° 56' W.2085.3) feet to post; thence by land of T. S. Marshall and land of G. S. Shirley, South fifty eight degrees twenty four minutes West one thousand three hundred and sixty eight (S.59° 24' W.1368) feet to post center of the public road; thence by land of said G. C. Shirley, South fifty eight degrees and forty five minutes West one thousand three hundred sixty two and seven tenths (S.58° 45' W.1362.7) feet to an ash; thence by the same South twenty two degrees ten minutes East three hundred and eighty nine (S.22° 10' E.389) feet to a post; thence by the same and land of Matt Bedeck, formerly J. K. Earhart's heirs, South forty degrees twenty seven minutes West one thousand one hundred and ninety one (S. 40° 27' W.1191) feet to white oak stump; thence by the same, South four degrees forty eight minutes East two thousand eighty nine and two tenths (S.4° 48' E. 2089.2) feet to post; thence by the same, South seventy one degrees thirty four minutes West one thousand one hundred fifty six and one tenth (S.71° 34' W.1156.1) feet to post; thence by the same, South seventy seven degrees twenty one minutes West two hundred thirty six and four tenths (S.77° 21' W.236.4) feet to post; thence by land of Mary Cunkleman, South four degrees forty four minutes East seven hundred and thirty one (S.4° 44' E.751) feet to a hickory stump; thence by the same, North fifty one degrees fifty one minutes East three hundred forty eight and five tenths (N.51° 51' E.348.5) feet to post; thence by land of Edward L. Beech and land of T. H. Coleman, North fifty six degrees thirty eight minutes East two thousand six hundred forty four and two tenths, N.56° 58' E.2644.2) feet to a white oak; thence by land of T. H. Coleman, South sixty nine degrees forty seven minutes East one hundred twenty eight and nine tenths (S.69° 47' E.128.9) feet to a stone; thence by

same, North sixty five degrees forty nine minutes East five hundred eighty seven and eight tenths (N.65° 49' E.587.8) feet to a post; thence by same, North sixty nine degrees fifty five minutes East four hundred seventy eight and nine tenths (N.69° 55' E.478.9) feet to post; thence by the same, North seventy five degrees thirteen minutes East one thousand five hundred seventy two and five tenths (N.75° 13' E.1572.5) feet to post in line of land of Robert Coleman; thence by land of said Robert Coleman, North twenty nine degrees forty minutes West one thousand two hundred sixty and four tenths (N.29° 40' W.1260.4) feet to white oak; thence by the same North seven degrees twenty five minutes East three hundred thirty seven and nine tenths (N.7° 25' E.337.9) feet to post; thence by the same North sixty three degrees fifteen minutes East four hundred and twelve (N.63° 15' E.412) feet to a maple; thence by the same South eighty eight degrees thirty seven minutes East one thousand sixty two and two tenths (S.88° 37' E.1062.2) feet to a post; thence by same, North five degrees thirty one minutes West ninety seven and six tenths (N. 5° 31' W.97.6) feet to a post; thence by the same, North seventy one degrees twenty seven minutes East three hundred eighty five and eight tenths (N. 71° 27' E.385.8) feet to a post; thence by land of Mary Shearer, North ten degrees thirteen minutes West one thousand two hundred sixty and nine tenths (N.10° 13' W.1260.9) feet to ash, the place of beginning, CONTAINING three hundred forty and six tenths (340.6) acres.

Being the coal, together with mining rights &c. in and underlying the same tract of land which J. N. Coleman died seized, and title to which became vested in the parties of the first part as the surviving heirs of said J. N. Coleman, deceased.

TOGETHER with the right to mine and remove all of said coal, without being required to provide or leave support for the overlying strata or surface, and without

being liable for any injury to the said overlying land or to the structures thereon, or the springs or water courses therein or thereon, by reason of the mining and removing of said coal, or other coal on lands adjacent thereto, or by reason of manufacturing into coke this or other coal at works of the said party of the second part wherever the same may be located, and together with all surface privileges reasonably necessary to pump, drain or ventilate this or other coal, or to enter, reach, remove and transport said coal or other coal, and with the right to make, maintain and use railroads, roads, trolley lines and drains upon or under the surface of said land, and to locate such buildings and other structures, for the purpose of mining, removing and transporting said coal and other coal as may be necessary and proper for the convenient use and working of the mines connected with said premises, with the right to deposit the waste or dirt of the said mines or works upon the surface convenient thereto, thereby releasing all and every claim for damages to said lands, the waters thereon and therein, and the buildings now or hereafter to be erected thereon, caused by exercising the rights aforesaid.

TOGETHER with all and singular the said property, improvements, ways, waters, water courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging, or in any wise appertaining, and the reversions and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, claim and demand whatsoever, of the said parties of the first part, in law, equity or otherwise howsoever, of, in and to the same and every part thereof.

TO HAVE AND TO HOLD the said coal, together with mining rights &c., hereditaments and premises hereby granted or mentioned, and intended so to be, with the appurtenances, unto the said party of the second part, his successors and assigns, to and for the only proper use and behoof of the said part of the second part, his successors and assigns forever.

And the said parties of the first part, for themselves, their heirs, executors and administrators, do by these presents covenant, grant and agree to and with the said party of the second part, his successors and assigns, that they, the said parties of the first part and their heirs, all and singular the hereditaments and premises herein above described and granted or mentioned, and intended so to be, with the appurtenances, until the said party of the second part, his successors and assigns, against them, the said parties of the first part, and their heirs, and against all and every other person or persons whomsoever lawfully claiming, or to claim the same or any part thereof, shall and will warrant and forever defend, have to these presents set their hands and seals. Dated the day and years first above written.

Sealed and delivered	/s/ Albert L. Coleman	[SEAL]
in the presence of	/s/ Lottie M. Coleman	[SEAL]
/s/ [Illegible]	/s/ Ada C. McClelland	[SEAL]
	/s/ Howard J. McClelland	[SEAL]
	/s/ William S. Coleman	[SEAL]
	/s/ Belle M. Van Horn	[SEAL]
	/s/ George H. Van Horn	[SEAL]
	/s/ Jennie May Wolf	[SEAL]
	/s/ Verner U. Wolf	[SEAL]
	/s/ Paul Coleman	[SEAL]

Margaret H. S. Killen
as to Paul Coleman.

JOINT EXHIBIT 6

No. 14

GEORGE W. GUTHRIE, and
ADALINE GUTHRIE his wife,

to

JOSEPH E. BARNES.

Dated March 29, 1901.

Acknowledged same day before
J. B. Connor J. P.

Recorded April 27, 1901, in
Deed Book Vol. 119, page 326.

Grants, bargains, sells and conveys unto the said grantee his heirs and assigns, ALL the coal of the Pittsburgh or River vein underlying that certain tract of land situate in Perry Township, Greene County, Pennsylvania, bounded and described as follows, to wit:— BEGINNING at a stone thence by lands of Hudson Rose and John Vandruff heirs S. 6° 8' E. 261.60 P. to a stone; thence by land of John Vandruff's heirs S. 55° E. 29.60 P. to a stone; thence by same S. 73° E. 11.6 P. to a stone; thence by land of Spencer Cowell N. 19 3/4° E. 89.36 P. to a stone; thence by same N. 69° W. 7.98 P. to a post; thence by same N. 1° W. 14.33 P. to a post; thence by same N. 3 3/4° E. 30.24 P. to a post; thence by same N. 31° E. 69.14 P. to a stone; thence by lands of D. Lockard N. 5° W. 60.39 P. to a stone; thence by same N. 26.26 P. to a stone; thence by land of Lindsey

Stephens N. 67) W. 63.63 P. to a stake; thence by same S. 80° W. 22.50 P. to the place of Beginning, Containing 125,897 Acres, according to a survey made by G. F. Headley in June 1900.

TOGETHER with all the rights and privileges necessary and useful in the mining and removing of the said coal, including the right of mining the same without leaving any support for the overlying strata and without liability for any injury which may result to the surface from the breaking of the said strata, the rights of ventilation and drainage and of access to the mines for men and materials, the shafts or openings for such purposes however, to be in the ravines and waste places upon said land not nearer than 10 rods of the principal buildings thereon. And any surface ground required for the operating or manufacturing may be taken but shall be paid for before being occupied at the rate of \$100 per acre, which payment shall entitle the party to the second part to a deed in fee for the same.

Also the right of mining, ventilating, draining and transporting the coal of other lands through the mines and openings in and upon the lands of the parties of the first part.

The parties of the first part reserve the right to drill and operate through said vein of coal for oil and gas.

(Stamped).

JOINT EXHIBIT 7

3.

HENRY FOX TRACT.

All the coal of the Pittsburgh or River vein underlying all that certain tract of land situate on Shannons Run, in Perry Township, Greene County, Pennsylvania, bounded and described as follows, to wit:

Beginning at a stone, thence by land of Eli Fox, North 6 degrees 36 minutes East 26.71 perches to a stone; thence by same, North 34 degrees 31 minutes West 22.45 perches to a stone; thence by same, North 46 degrees 50 minutes West 12.40 perches to stake; thence by same, South 15 degrees 01 minute East 37.71 perches to stone; thence by same, South 44 degrees 36 minutes West 126.42 perches to stone; thence by land of Henry Fox, South 76 degrees 45 minutes East 41.10 perches to stake; thence by same, South 86 degrees 45 minutes East 13 perches to a stake; thence by same, North 88 degrees East 10 perches to stake; thence by same, North 73 degrees 30 minutes East 21.21 perches to stake; thence by same and land of Warren Haines, North 60 degrees 02 minutes East 73 perches to chestnut oak; thence by land of Warren Haines, North 57 degrees 04 minutes East 11 perches to stone; thence by same, North 45 degrees East 7 perches to stake; thence by same, North 77 degrees 30 minutes East 8.8 perches to stake; thence by land of Josephus Lemley, North 20 degrees 15 minutes West 3.5 perches to point; thence by same, North 19 degrees East 28.55 perches to stone; thence by land of Eli Fox, South 88 degrees 28 minutes West 78.51 perches to stone, the place of beginning, containing 58.283 Acres.

Together with all the rights and privileges necessary and useful in the mining and removing of the said coal, including the right of mining the same without leaving

any support for the overlying strata, and without liability for any injury which may result to the surface from the breaking of said strata, the right of ventilation and drainage and of access to the mines for men and materials, the shafts or openings for such purpose, however, to be in the ravines and waste places upon said lands and not nearer than 50 rods of the principal buildings thereon, and any surface ground required for operating or manufacturing of any kind may be taken, but shall be paid for before being occupied at the rate of \$100.00 per acre; also the right of mining, ventilating, draining and transporting the coal of other lands through the mines and openings in and upon the lands above described; reserving the right to drill and operate through said coal for oil and gas.

JOINT EXHIBIT 8

ITEM NO. 26.

SPENCER M. COWELL and SUDE A., his wife

to

JOSIAH V. THOMPSON.

General Warranty Deed.
Dated January 3, 1912.

Acknowledged same day.

Recorded January 15, 1912, in
Deed Book Vol. 219 Page 123
Consideration—\$1.00, &c.

Do grant, bargain, sell, align, enfeoff, release, convey and confirm unto the said party of the second part, his heirs and assigns,

ALL the undivided one third of the Nine feet, Pittsburgh or River vein of coal in and under that certain tract of land situate partly in Perry Township and partly in Whiteley Township, Greene County, Pennsylvania, bounded and described as follows:—

BEGINNING at a stone, thence by land of David Lockhart's heirs, S. $43^{\circ} 59'$ E. 67.33 P. to white oak; thence, by land of Arthur Thomas, S. 31° W. 75.78 P. to B. O.; thence, by same, S. $39^{\circ} 57'$ E. 26.68 P. to a stone; thence, by land of Eli Fox, S. $26^{\circ} 5'$ W. 15.19 P. to a stone; thence, by same, S. $37^{\circ} 45'$ W. 67.85 P. to stone; thence, by land of William Vandruff, N. $73^{\circ} 30'$ W. 38.74 P. to post; thence, by land of George W. Guthrie, N. $20^{\circ} 21'$ E. 87.76 P. to post; thence, by same, N. $68^{\circ} 22'$ W. 8 P. to post; thence, by same, N. $0^{\circ} 29'$ W. 14.23 P. to stone; thence, by same, N. $4^{\circ} 22'$ E. 30.08

P. to chestnut; thence, by same, W. $31^{\circ} 43'$ E. 69.43 P. to stone, the place of BEGINNING:

CONTAINING 65.238 acres, according to survey made by G. F. Headley, on October 12, 1911.

TOGETHER with all the rights and privileges necessary and useful in the mining and removing of the said coal, including the right of mining the same without leaving any support for the overlying stratas and without liability for any injury which may result to the surface from the breaking of said strata, the right of ventilation and drainage, and of access to the mines for men and materials; the shafts or openings for such purpose, however, to be in the ravines and waste places upon said land, and not nearer than ten (10) rods of the principal building thereon. And any surface ground required for operating or manufacturing of any kind may be taken, but shall be paid for before being occupied, at whatever price may be agreed upon per acre, which payment shall entitle the party of the second part to a deed in fee for the same; ALSO, the right of mining, ventilating, draining and transporting the coal of other lands through the mines and openings in and upon the lands of the parties of the first part.

The parties of the first part reserve the right to drill and operate through said coal for oil and gas without being held liable for any damages.

HABENDUM REGULAR.

JOINT EXHIBIT 9

NAME OF TRACT

JACOB HAVER NO. 2

Conveyed By J. V. Thompson per Trustees and J. G. Butler Jr.

Date of Deed June 28, 1918

Plan Number

Index No.—Deed #7718 at 3rd

Abstract #8113, #11260.

Prior Deeds #7503-#7505-#7525-
#7566-#7603

Recorded—Book 264

Page 125

Area—Deed 179.017 acres

Survey

Location—County Greene

Township Jefferson

Consideration

Coal Acres Deed 179.017 acres

Survey

Surface

Interest ALL the Nine foot, Pittsburgh or River vein
or seam of coal.

Exceptions

Deductions—Coal Field
Surface Sold

Consideration

Areas Coal Assigned to Other Plants

MINE

CUMBERLAND COAL COMPANY (Butler Purchase)

Remarks In the settlement for the coal underlying this tract, 0.16 of an acre was deducted for the support of one gas well, thus leaving the net area of coal settled for as 178.857 acres.

See also deed #7738, J. R. Nutt et ux, to Cumberland Coal Company, dated June 4, 1918, deed book 264, page 23.

By agreement dated Sept. 30, 1930, the Equitable Gas Company was granted the right to drill two gas or oil wells on this tract. Agr. #8192, General File 994 at 137.

Mining Rights From Deed #7603, Jacob Haver et ux, to Joseph E. Barnes, as follows: "Together with the right to mine and remove all and every part of the same, without being required to provide for the support of the overlying strata or surface, and without being liable for any injury to the same or to anything therein or thereon by reason thereof, and with all reasonable privileges for ventilating, pumping and draining the mines, and the right to keep and maintain roads and ways in and through said mines forever, for the transportation of the said coal, &c. and of coal, minerals and other things from and to other lands.

Reserving the right to operate for oil or gas."

Practically the same mining rights conveyed
by deed #7718.

NAME OF TRACT

JACOB HAVER NO. 3

Conveyed By J. V. Thompson per Trustees and J. G. Butler, Jr.

Date of Deed June 28, 1918

Plan Number 11-E-2 Sheet 3

Index No.—Deed Eng File 1576 at 3rd

Abstract #8113 Att. #27

Prior Deeds #7503-#7505-#7525-
#7566-#7603 Eng. File 1003-1714

Recorded—Book 264

Page 125

Area—Deed 179.017 acres

Survey

Location—County Greene

Township Jefferson

Consideration

Coal Acres Deed 179.017 acres

Survey 179.2676 A. 3-9

Surface

Interest ALL the Nine foot, Pittsburgh or River vein
or seam of coal.

Exceptions

Deductions—Coal Sold

Consideration

Surface Sold

Areas Coal Assigned to Other Plants

MINE

CUMBERLAND COAL COMPANY (Butler Purchase)

Remarks In the settlement for the coal underlying this tract, 0.16 of an acre was deducted for the support of one (no well, time leaving the not area of coal settled for as 178.857 acres.

This tract is subject to the rights of the Equitable Gas Co. to drill gas or oil well #2993 thru the Pittsburgh or River Vein or Seam of Coal at location shown on plan 10-L-1081 As granted by Cumberland Coal Co., Sept. 30, 1930, Deed 8192, Eng. file 2553.

Mining Rights From Deed #7603, Jacob Haver et ux, to Joseph E. Barnes, as follows: "Together with the right to mine and remove all and every part of the same, without being required to provide for the support of the overlying strata or surface, and without being liable for any injury to the same or to anything therein or thereon by reason thereof, and with all reasonable privileges for ventilating, pumping and draining the mines, and the right to keep and maintain roads and ways in and through said mines forever, for the transportation of the said coal, &c. and of coal, minerals and other things from and to other lands.

Reserving the right to operate for oil or gas."

Practically the same mining rights conveyed
by deed #7718. Eng. File 1676 at 3rd.

THIS INDENTURE,

Made the thirty first day of January in the year-of our Lord one thousand nine hundred — Between Jacob Haver, and Martha A. Haver, his wife, of Jefferson Township, Greene County Pennsylvania, parties of the first part and Joseph E. Barnes, of Uniontown, Fayette County Pennsylvania, party of the second part: Witnesseth, that the said parties of the first part, for and in consideration of the sum of Seven thousand seven hundred eighty one and 00/100. Dollars. \$7.781.00. — lawful money of the United States of America unto them well and truly paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, convey and confirm unto the said party of the second part, his heirs, and assigns, All the nine-foot, Pittsburg or River vein or seam of coal within and underlying the following described tracts of land situate in Jefferson Township Greene County Pennsylvania, bounded and described as follows; ————— No. 1. Beginning at a stone in the road by land of John Cotterrel, thence by land of the same South 16 degrees East 6.2 rods to a stone, thence by the same South 1-1/2 degrees West 38.2 rods to a stone, thence by the same South 13-1/2 degrees East 9.6 rods to a stone, thence by the same South 37 1/2 degrees East 6.9 rods to a stone, thence by the same South 65 degrees East 12.18 rods to a stone, thence by land of B.L. Craft, North 49 degrees East 207.73 rods to a stone, thence by the same North 47-3/4 degrees East 23.9 rods to stone, thence by same South 26 degrees East 16.76 rods to stone, thence by Nutt, North 49-1/4 degrees East 23.25 rods to a stone, thence North 24-1/2 degrees West 100.96 rod to a stone by road, thence by lands of Daniel Moredock and Geo. Moredock South 82-1/2

degrees West 49.9 rods to a post, thence by lands of Chas. Haver South 27 degrees East 9.7 rods to a stone in the road, thence by same South 62-3/4 degrees West 54.3 rods to a stone, thence by same South 49 degrees West 36.76 rods to a stone, thence by the same South 53-3/4 degrees West 91.8 rods to a stone, thence by land of W.P. Kendall South 30 degrees East 7.6 rods to a stone, thence by the same South 21 degrees East 13 rods to a stone, thence by the same South 5 degrees East 24.7 rods to stone, formerly white oak, thence by lands of Charles Davis, South 5-1/2 degrees West 27.6 rods to the place of beginning. Containing 179 acres and 2.7 perches. No. 2. Beginning at a corner by land of Robert Jordan, thence by land of Thomas Kent, South 33 degrees East 55.7 rods to stone, thence by land of Charles Davis, North 70-1/4 degrees East 61.69 rods to W.O. thence by land of W.P. Kendall, North 18 degrees East 17 rods to stone, thence by same North 32-3/4 degrees East 11.06 rods to post, thence by same North 17 degrees East 11.23 rods to stone at side of road, thence by same South 39-1/2 degrees East 11.84 rods to stone below road, thence by same North 60-1/4 degrees East 31.35 rods to post, thence by land of Chas Haver, North 5-1/4 degrees West 98.42 rods to stone in road, thence by land of R. McGovern, South 28-1/2 degrees West 19 rods to stone in the road, thence by same North 59-3/4 degrees West 23.56 rods to a stone, thence by same South 47-1/2 degrees West 37.04 rods to a stone thence by land of W.J. McMin, South 40-1/2 degrees East 16.41 rods to stone, thence by same South 60-1/4 degrees West 81 rods to post, then by land of Hugh Cree, South 66-1/4 degrees West 34 rods to post, thence by same North 80-1/2 degrees West 18.16 rods to stone in private road thence by land of Mary Denney, South 10-1/2 degrees West 14.21 rods to a W.O. stump, thence by land of Robt. Jordan South 79 degrees East 40.12 rods to the place of beginning. Containing 80 acres and 57 perches. The two tracts containing 259 acres and 59.7 perches. Together with the right to mine

and remove all and every part of the same, without being required to provide for the support of the overlying strata or surface, and without being liable for any injury to the same or to anything therein or thereon by reason thereof, and with all reasonable privileges for ventilating, pumping and draining the mines, and the right to keep and maintain roads and ways in and through said mines forever, for the transportation of the said coal, &c. and of coal, minerals and other things from and to, other lands.

Together with all and singular the said property, improvements, ways, waters, water courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part, in law, equity or otherwise howsoever, of, in and to the same and every part thereof.

To have and to hold the said coal and mining rights, the hereditaments and premises hereby granted or mentioned, and intended so to be, with the appurtenances, unto the said party of the second part, his heirs and assigns, to and for the only proper use and behoof of the said party of the second part, his heirs and assigns forever. And Jacob Haver and Martha A. Haver, the said parties of the first part, for themselves, their heirs, executors and administrators, do—by these presents covenant, grant and agree to and with the said party of the second part, their heirs and assigns, that they the said part of the first part, their heirs all and singular the hereditaments and premises herein above described and granted or mentioned, and intended so to be, with the appurtenances, unto the said party of the second part, their heirs and assigns against them the said parties of the first part and their heirs, and against all and every other person or persons whomsoever lawfully claiming, or

to claim the same or any part thereof, shall and will warrant and forever defend.

In Witness Whereof, the said parties of the first part have to these presents set their hands and seals. Dated the day and year first above written.

Sealed and Petitioned
in the Presence of

/s/ J. A. Rex

/s/ Jacob Haver [SEAL]

/s/ Weatherford Haver [SEAL]

[SEAL]

JOINT EXHIBIT 10

NAME OF TRACT

ANDERSON MOREDOCK

Conveyed By J. V. Thompson, per Trustees, et al

Date of Deed May 20, 1918

Plan Number

Index No.—Deed #7717 at 9th

Abstract #8118

Prior Deeds #7509-#7612-#7709

Recorded—Book 264

Page 251

Area—Deed 8.866 acres

Survey

Location—County Greene

Township Jefferson-Cumberland

Consideration

Coal Acres Deed 8.866 acres

Survey

Surface

Interest ALL the coal of the Pittsburgh or River Vein.

Exceptions

Deductions—Coal Sold 3.152 A.°

Consideration

Surface Sold

Areas Coal Assigned to Other Plants

MINE

CUMBERLAND COAL COMPANY (Butler Purchase)

Remarks The coal sold, i.e. 3.152 acres, conveyed to Crucible Fuel Co., Jan. 15, 1925. For copy of deed see #6004, and for correspondences relative exchange which included this tract, see general file #994.

See deed No. 7799, dated Mar. 18, 1919, at "Sixth", George S. Harah to Cumberland Coal Co.

By deed dated June 23, 1919, PAUL J. BICKEL, ETUX conveyed to Cumberland Coal Co. at "Twelfth-Anderson Moredock Tract" in said deed, all the undivided 1/7th of all the coal of the Pgh. or River vein in and under this tract, Deed No. 7803; together with 1/2 mining rights as conveyed by deed No. 7612.

Mining Rights From Deed #7612, Anderson Moredock et ux, to J. V. Thompson et al, as follows: "Together with the free and uninterrupted right of way into, upon, and under said land, at such points, and in such manner as may be proper and necessary for the purpose of digging, mining, cokeing, draining and ventilating, and carrying away said coal (hereby waiving all surface damages, or damages of any sort, arising therefrom, or from the removal of all of the said coal) together with the privilege of mining and removing through said described premises, other coal belonging to said parties of the second part their heirs and assigns, or which may hereafter be acquired—Any surface used by party of second part, their heirs or assigns to be paid for at an appraised price at time of its occupancy".

Practically the same mining rights conveyed
in deed #7717.

NAME OF TRACT

ANDERSON MOREDOCK

Conveyed by J. V. Thompson, per Trustees, et al
 Date of Deed May 20, 1918
 Plan Number 11-E-2, Sheet #1
 Index No.—Deed Eng File 1677
 Abstract #8110
 Prior Deeds #7509-7612-17709 Eng. File 10.58
 Recorded—Book 264
 Page 262
 Area—Deed 8,966 acres
 Survey 1.10 Jeff. A.792 Cum.
 Location—County Greene
 Township Jefferson-Cumberland
 Consideration
 Coal Acres Deed 8,966 acres
 Survey
 Surface
 Interest All the coal of the Pittsburgh or River Vein
 Exceptions
 Deductions—Coal Sold
 Consideration
 Surface Sold
 Areas Coal Assigned to Other Plants

MINE

CUMBERLAND COAL COMPANY (Butler Purchase)

Remarks See Engrs. File 1825 and 1826 at Item #12 in each of above deeds. See Eng. File #1822-6th.

Coal sold, i.e., 3,152 acres conveyed to Crucible Fuel Co. Jan. 15, 1925, being part of the Crucible Coal exchange. Plan 3-D-118 Engr. file 5911.

Mining Rights—From Deed #7613, Anderson Moredock et ux, to J. V. Thompson et al, as follows: "Together with the free and uninterrupted right of way into, upon, and under said land, at such points, and in such manner as may be proper and necessary for the purpose of digging, mining cokeing, draining and ventilating, and carrying away said coal (hereby waiving all surface damages, or damages of any sort, arising therefrom, or from the removal of all of the said coal) together with the privilege of mining and removing through said described premises, other coal belonging to said parties of the second part their heirs and assigns, or which may hereafter be acquired—Any surface used by party of second part, their heirs or assigns to be paid for at an appraised price at time of its occupancy".

Enc. File 1677

Practically the same mining rights conveyed in deed #771

MINING RIGHTS DEED

This indenture made the thirteenth day of October in the year of our Lord one thousand eight hundred and ninety nine, between Anderson Moredock and Sarah Moredock, his wife, of Jefferson Township, Greene County and State of Pennsylvania, farmer, as parties of the first part and J. V. Thompson, Altha L. Moser, S. L. Mestrezat, Henry C. Huston, I. W. Semans, J. M. Husted and W. A. Longacker of Fayette County and State of Pennsylvania, as parties of the second part. Witnesseth, that the said parties of the first part, for and in consideration of the sum of three hundred and ninety-eight dollars and ninety-five cents, (389.95) lawful money of the United States of America, well and truly paid by the said parties of the second part to the said parties of the first part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, convey and confirm, unto the said parties of the second part their heirs and assigns all the coal of the Pittsburgh or River Vein, in and under all that certain tract of land situate in Jefferson and Cumberland Township, County of Greene and State of Pennsylvania, and bounded and described as follows: to wit, beginning at a stone formerly a w.o. stump, thence by lands of Thomas Johnson S. 20 degrees and 26 minutes east fifty one and thirty one-hundredth perches to a stone near a wild cherry; thence by lands of same south 23 degrees and 8 minutes west nineteen and one one-hundredth perches to a stone; thence by the same south 13 degrees and 30 minutes east, eleven and forty-four one-hundredth perches to a red oak stump; thence by the lands of Sil Kelly south 17 degrees and 53 minutes east, twelve and thirty four-one hundredth perches to a stone; thence by the lands of heirs of Mrs. Monroe Waters north 85 degrees and 30 minutes, east, five and eleven one-hundredth perches to

a stone in the run; thence in the lands of Richard Willis, north 13 degrees east, fifty eight and forty one-hundredth perches to stone in the road; thence by the same, north 11 degrees west eight perches to a stone in the road; thence by same, north 34 degrees west, ten perches to a stone in the road; thence north 4 degrees west six and 50 one hundredths perches to a stone; thence north 30 west, four and fifty-hundredth perches to a stone; north 80 degrees west, twenty four perches to the place of beginning, containing eight acres and one hundred and thirty eight and five-tenths perches (8 a. 138,5 prs.) together with the free and uninterrupted right of way into, upon, and under said land, at such points, and in such manner as may be proper and necessary for the purpose of digging, mining, cokeing, draining and ventilating, and carrying away said coal (hereby waiving all surface damages, or damages of any sort, arising therefrom, or from the removal of all of the said coal) together with the privilege of mining and removing through said described premises, other coal belonging to said parties of the said second part their heirs and assigns, or which may hereafter be acquired—any surface used by party of second part, their heirs or assigns to be paid for at an appraised price at time of its occupancy; to have and to hold the said Pittsburgh or River Vein of coal underlying the said described tract of land, and the rights, privileges, hereditaments and premises hereby granted, or mentioned and intended so to be, with the appurtenances, until the said parties of the second part, their heirs and assigns, to and for the only proper use and behoof of the said parties of the second part, their heirs and assigns, forever—any use or occupancy of the surface of said tract of land by the said parties of the second part, their heirs or assigns to be paid for in manner as hereinbefore provided.

And the said parties of the first part, for themselves, their heirs, executors and administrators, do by these presents, covenant, grant and agree to and with the said parties

of the second part their heirs and assigns, that they, the said parties of the first part and their heirs, all and singular the hereditaments and premises herein above described and granted, or mentioned and intended so to be, with the appurtenances, in the quiet and peaceable possession of the said parties of the second part their heirs and assigns against them the said parties of the first part, their heirs, and against all and every other person or persons whomsoever, lawfully claiming or to claim the same of any part thereof—saving the use and occupancy of any of the surface of said tract of land which is to be paid for in manner as herein before provided—shall and will warrant and forever defend. In witness whereof the said parties of the first part have to these presents set their hands and seals. Dated the day and year first above written.

Signed, sealed and delivered

in presence of

/s/ W. S. Register /s/ Anderson Moredock [SEAL]

/s/ F. L. Lincoln /s/ Sarah Moredock [SEAL]

Received the day of the date of the above indenture of the above named J.V. Thompson, Altha L. Moser, S.L. Mestrezat, Henry C. Huston, J. W. Semans, J. M. Husted and W.A. Longanecker the sum of three hundred and ninety eight dollars and ninety-five cents, lawful money of the United States being the consideration money above mentioned in full.

Attest

/s/ F. L. Lincoln

By: /s/ Anderson Moredock

[SEAL]

JOINT EXHIBIT 11

NAME OF TRACT

ISAAC F. RANDOLPH

Conveyed by Duquesne National Bank, et al.

Date of Deed July 1st, 1918

Plan Number

Index No.—Deed #7716 at 1st

Abstract #8110

Prior Deed #7514-#7630-#7638

Recorded—Book 264

Page 1

Area—Deed 104.551 acres

Survey

Location—County Greene

Township Jefferson

Consideration

Coal Acres Deed 104.551 acres

Survey

Surface Acres Deed 104.551 acres

Interest All the coal of the Pittsburg or River vein

Exceptions

Deductions—Coal Sold

Consideration

Surface Sold

Areas Coal Assigned to Other Plants—This entire tract assigned to Dilworth, 1925

MINE

CUMBERLAND COAL COMPANY (Butler Purchase)

Remarks In the settlement for this tract there was deducted an area of 0.32 of an acre for support for two gas wells on this tract, thus leaving a net area of 104.231 acres.

See also deed # 7739, Alice B. Hogg to Cumberland Coal Company, dated June 12, 1918, deed book 264, page 37.

Mining Rights: From Deed # 7630, Isaac F. Randolph, per Executors to Frank T. Hogg, as follows: "TOGETHER with the free and uninterrupted right of way into, upon and under said lands at such points and in such manner as may be proper and necessary for the purpose of digging, mining, draining and ventilating and carrying away said coal (hereby waiving all surface damages, or damages of any sort arising therefrom, or from the removal of all of said coal) together with the privilege of mining and removing through said described premises other coal belonging to the said party of the second part, his heirs and assigns; or which may hereafter be acquired. Saving and reserving to the parties of the first part the right to bore through said coal for oil or gas without cost or hindrance".

Practically the same mining rights conveyed in deed # 7716.

NAME OF TRACT

ISAAC F. RANDOLPH

Conveyed by Duquesne National Bank, et al.

Date of Deed July 1, 1918

Plan Number 11-B-2—Sheet 2

Index No. Deed Eng. File #1674 at 1

Abstract #8810 Att. #1

Prior Deeds 7514-7630-7638—Eng. File 978

Recorded Book 264

Page 1

Area—Deed 104.551 Acs.

Survey

Location—County Greene County

Township Jefferson

Consideration

Coal Acres—Deed 104.551 Acs.

Survey 74.9553 A. 29.7302 A. 104.6855 A. Total

Surface

Interest All the coal of the Pittsburg or River vein

Exceptions

Deductions—Coal Sold

Consideration

Surface

Areas Coal Assigned to Other Plants

MINE

CUMBERLAND COAL CO. (Butler Purchase)

Remarks: In the settlement for this tract there was deducted an area of 0.32 of an acre for support for two gas wells on this tract, thus leaving a net area of 104.231 Acres.

29.730 acres of surface overlying portion of this coal tract purchased by H.C. Frick Coke Co., May 5, 1922. See Plan 14-D-318. Eng. File 3287.2 of this tract. See 4-E-1095 for surface owner of part of this tract. For plugging data of Equitable Gas Well No. 2604, see Engr. File 10077.

Mining Rights From Deed # 7630, Isaac F. Randolph, per Executors to Frank T. Hogg, as follows: "Together with the free and uninterrupted right of way into, upon and under said lands at such points and in such manner as may be proper and necessary for the purpose of digging, mining, draining and ventilating and carrying away said coal (hereby waiving all surface damages, or damages of any sort arising therefrom, or from the removal of all of said coal) together with the privilege of mining and removing through said described premises other coal belonging to the said party of the second part, his heirs and assigns; or which may hereafter be acquired. Saving and reserving to the parties of the first part the right to bore through said coal for oil or gas without cost or hindrance."

Practically the same Mining Rights conveyed in
Deed # 7716

THIS INDENTURE

Made the twentieth day of March in the year of our Lord one thousand nine hundred Between R.C.F. Randolph and Jonah F. Randolph, Executors of the last will and testament of Isaac F. Randolph, late of Jefferson township, Greene County, Pennsylvania, deceased, of the first part,

AND

Frank T. Hogg of Pittsburg, Allegheny County, Pennsylvania, party of the second part.

WHEREAS the said Isaac F. Randolph became in his lifetime seized in his demesne, as of fee of, in and to a certain tract of land situate in Jefferson township, Greene County, Pennsylvania, adjoining land now or formerly of John Bayard, Andrew Sharpneck, Catherine and Frank Randolph, Michael and Jeremiah Price and William Wood, containing one hundred and four acres and eighty eight and two tenths perches; and being so thereof seized made his last will and testament in writing bearing date the 25th day of January 1867, wherein and whereby he disposed of his real estate as follows: "I give unto my wife the use, rents and profits of my farm as long as she remains my widow * * * then I order my executors or either of them within one year either the death or marriage of widow, to sell all of my estate, real, personal or mixed, and the purchase money to be in three annual payments after paying all expenses to make an equal dividen of the remainder as it comes due among my surviving children, share and share alike."

"My will is that if any of my children should die before my estate is divided and leaving children, my will is that they should draw their fathers or mothers share, to be equally divided among them."

"I do appoint my sons Jonah and Robert Clarkson to by my executors of this my last will and testament—do

ratify and confirm their sales to be good and valid in law."

AND WHEREAS the said testator died and the aforesaid will was duly probated on December 26, 1876, and registered in the office of the Register of wills in and for Greene County, Pennsylvania, in Will Book No. 5, page 77, and Letters Testamentary were granted to the aforesaid Jonah F. Randolph and R.C.F. Randolph.

AND WHEREAS (Sarah Ann, widow of Isaac F. Randolph having died on the 23rd of October 1892) there being no express power in the aforesaid will authorizing the said executors to make deeds or to separate coal and mining rights from the surface, they presented their petition to the Orphans' Court of Greene County, Pa., at No. 99, January Court, 1900, setting forth the fact that they had sold the Pittsburg or River Vein of coal in and under the aforesaid tract of land and certain mining rights hereinafter fully set forth to Frank T. Hogg, party of the second part, and on March 7, 1900, obtained an order from said court ratifying and confirming the sale so as aforesaid made to Frank T. Hogg and directing the said executors to make and execute a good and sufficient deed and upon receipt of the purchase money to deliver the same, to the said Frank T. Hogg his heirs and assigns, first giving bond to the said Court for the faithful application of the purchase money. AND WHEREAS the said executors have presented their bond to the aforesaid Orphans' Court and the same has been approved and filed.

NOW THIS INDENTURE WITNESSETH that the said R.C.F. Randolph and Jonah F. Randolph, executors as aforesaid, for and in consideration of the sum of Forty one hundred, eighty two and 5/100 (\$4182.05) Dollars to them in hand paid by the said Frank T. Hogg, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, have granted, bargained,

sold, aliened, released, and confirmed, and by these presents, by force of the aforesaid will and Order of Court, do grant, bargain, sell, alien, release, and confirm, unto the said Frank T. Hogg, his heirs and assigns, all the coal of the Pittsburg or River Vein in and under all that certain tract of land situate in Jefferson Township, Greene County, Pennsylvania and bounded and described as follows:

BEGINNING at a Chestnut Oak in line of land of William Wood, thence by the said William Wood South eighty three (83) degrees forty five (45) minutes East, ninety five and sixty one one hundredths (95.61) perches to stone; thence by land of Michael and Jeremiah Price North sixteen (16) degrees fifteen (15) minutes East, one hundred and seventy and ninety six hundredths (170.96) perches to a stone; thence by land of John Bayard and Andrew Sharpneck North seventy eight (78) degrees twenty eight (28) minutes West, ninety four and thirty one hundredths (94.30) perches to a stone; thence by land of Catherine and Frank F. Randolph South seventeen (17) degrees and seven (7) minutes West, one hundred and eighty one and seventy nine hundredths (181.79) perches to a stone; thence by land of William Wood North seventy (70) degrees and thirteen (13) minutes East, three and twenty two hundredths (3.22) perches to the place of beginning, containing one hundred and four (104) acres and eighty eight and two tenths (88.2) perches, according to survey made by J.R. Throckmorton, 1900.

TOGETHER with the free and uninterrupted right of way into, upon and under said lands at such points and in such manner as may be proper and necessary for the purpose of digging, mining, draining and ventilating and carrying away said coal (hereby waiving all surface damages, or damages of any sort arising therefrom, or from the removal of all of said coal) together with the privilege of mining and removing through said described

premises other coal belonging to the said party of the second part, his heirs and assigns; or which may hereafter be acquired. Saving and reserving to the parties of the first part the right to bore through said coal for oil or gas without cost or hindrance.

TOGETHER with all and singular the rights, liberties, privileges hereditaments and appurtenances whatsoever thereunto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof, and also all the estate, right, title, interest, property, claim or demand whatsoever of the said Isaac F. Randolph at and immediately before the time of his decease, in law or equity or otherwise howsoever, of, in, to or out of the same.

TO HAVE AND TO HOLD the said Pittsburg or River Vein of coal and the mining rights aforesaid, the hereditaments and premises hereby granted or mentioned, or intended so to be, with the appurtenances subject to the reservation as to oil and gas hereinbefore set forth unto the said Frank T. Hogg, his heirs and assigns, to and for the only proper use and behoof of the said Frank T. Hogg, his heirs and assigns forever.

And the said Jonah F. Randolph and R.C.F. Randolph, each for himself alone, doth covenant, promise and agree to and with the said Frank T. Hogg, and his heirs and assigns, by these presents, that they, the said executors as aforesaid, have not done, committed, or knowingly or willingly suffered to be done or committed, any act, matter, or thing whatsoever, whereby the premises hereby granted, or any part thereof, may be impeached, charged or incumbered.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

Signed, sealed and delivered
in the presence of,

/s/ J. S. Rice

/s/ R.C.F. Randolph [SEAL]

/s/ Jonah F. Randolph [SEAL]
Executors of Isaac F. Randolph,
deceased.

[SEAL]

JOINT EXHIBIT 12

CAPTION

All the Pittsburgh or River Vein of coal within and underlying all that certain tract of land situate in the Township of Richhill, County of Greene and State of Pennsylvania, bounded and described as follows:

BEGINNING at a Post corner of land of Nelson Clutter and Hudson Cummins; thence by lands of Hudson Cummins and Daniel Clouse Heirs South 11 degrees 19 minutes West 99.22 perches to a Stake, thence by land of Jane A. Huffman, South 65 degrees and 49 minutes East 9.91 perches to an Ash, thence by same North 31 degrees and 25 minutes East 19.34 perches to stake; thence by same South 44 degrees and 41 minutes East 26.26 perches to stone; thence by lands of Stephen Stickles and Nelson Clutter North 12 degrees and 45 minutes East 84.82 perches to a Stake; thence by land of Nelson Clutter North 63 degrees and 35 minutes West 42.87 perches to the place of BEGINNING.

CONTAINING 22.022 acres, according to survey made by Dinsmore and Jenkins, C. E. September 1, 1903.

TOGETHER with free and uninterrupted right of way into, up and under said land at such points; and in such manner as may be proper and necessary for the purpose of digging, mining, coking and carrying away said coal hereby waiving all damages arising therefrom to the surface or to anything thereunder or thereon or from the removal of all the said coal; together with the privilege of mining and removing through said described premises, other coal belonging to said party of the second part, his heirs and assigns, or which may hereafter be acquired also the right to enter upon the surface and sink shaft for the purpose of ventilating or draining the mine at such points as will not interfere with the farm buildings.

The party of the first part reserves the right to drill and operate through said coal for oil, gas or any other minerals other than the coal hereby sold.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Plaintiffs,

vs.

NICHOLAS DEBENEDICTIS, *et al.*,
Defendants.

DEPOSITION OF THOMAS B. ALEXANDER

Thursday, November 10, 1983

The deposition of THOMAS B. ALEXANDER, called by the Plaintiff Keystone Bituminous Coal Association for examination, pursuant to notice and the Federal Rules of Civil Procedure pertaining to the taking of depositions, taken before me, the undersigned, Sheryl L. Akerley, a Notary Public in and for the Commonwealth of Pennsylvania, at the law offices of Rose, Schmidt, Dixon & Hasley, 10th Floor, Oliver Building, Pittsburgh, Pennsylvania 15222, commencing at 10:22 o'clock a.m., the day and date above set forth.

MR. INGRAM: I am Henry Ingram of the law firm of Rose, Schmidt, Dixon & Hasley, counsel for plaintiffs in Civil Action No. 82-2712.

This is the time and the place for the deposition of Thomas Alexander, pursuant to notice—

MR. HOFFMAN: Oral notice of Mr. Reed, and we simply agreed that it would be something we would be pleased to do to—

MR. INGRAM: —oral notice and agreement between counsel for plaintiffs and counsel for defendants.

Anything, Mr. Hoffman?

MR. HOFFMAN: No.

THOMAS B. ALEXANDER

called as a witness by the Plaintiff Keystone Bituminous Coal Association, having been first duly sworn, as hereinafter certified, was deposed and said as follows:

EXAMINATION

BY MR. INGRAM:

Q. Mr. Alexander, state your full name and residence address, please.

A. Thomas B. Alexander. I live at 142 East Edgewood Drive, McMurray. The zip code is 15317.

Q. And is that in Washington County, Pennsylvania, sir?

A. Yes, sir, it is.

Q. And by whom are you employed, Mr. Alexander?

A. Commonwealth of Pennsylvania.

Q. Any particular bureau or agency in the Commonwealth?

A. Yes, the Bureau of Mining and Reclamation, Department of Environmental Resources.

Q. And within the Bureau of Mining and Reclamation, are you associated with any particular section or group within that bureau?

A. Yes, I am.

Q. And what is that?

A. The mine subsidence division and the mine subsidence regulation section.

Q. Does that division maintain an office in this locale?

A. Yes, it does. It maintains an office in McMurray, Pennsylvania.

Q. Mr. Alexander, who is your direct superior within the Department of Environmental Resources?

A. My direct superior is Terry R. Fabian in the regional office, Pittsburgh.

Q. And what is his position with the Department?

A. He's the regional director, Department of Environmental Resources.

Q. Mr. Alexander, could you briefly describe your educational background?

A. Yes. I have had a total of four semesters of college education at Case Institute of Technology in Cleveland and Waynesburg College.

Q. How long have you been with the Department of Environmental Resources?

A. Since March of 1967.

Q. All right. When did you become the chief of the mine subsidence regulation section?

A. I became chief of then the mine subsidence—division of mine subsidence in August of 1978, and with then the retirement of the chief of that division, became, in 1979, August of 1979, became the chief of the mine subsidence regulation section of the division of mine subsidence.

Q. Okay. And prior to your becoming chief, you were employed in the administrative predecessor of the present section; is that correct?

A. Yes, I was.

Q. And what was your capacity?

A. Mining engineer.

Q. Mining engineer. Okay.

Were you a mining engineer throughout your entire employment with the—

A. With the Department, yes.

Q. Yes.

A. From March '67.

Q. Now, Mr. Alexander, could you describe briefly your functions in your present occupation, sir, functions, duties and responsibilities?

A. Yes. My function is the supervision and direction of the mine subsidence regulation section in permitting deep mining operations under the Mine Subsidence and Land Conservation Act of 1966 and its amendments.

Q. All right. If we refer to that Act as the 1966 Act, you will know what I'm talking about?

A. Yes, I will.

Q. Now, do I take it that you have general supervisory authority over the section, in terms of the operations of the section on a day-to-day basis?

A. Yes, I do.

Q. Is part of the function of the section to issue permits to conduct underground mining operations under the '66 Act, regulations and policies and guidelines of the Department?

A. Yes, it is.

Q. And does your office in McMurray issue those permits?

A. Yes, it does.

Q. Mr. Alexander, how many people are on your staff in the McMurray office?

A. Presently, 13.

Q. And could you describe generally what kinds of people there are? Do you have engineers?

A. We have mining engineers, hydrogeologists, mining specialists, underground bituminous mine inspectors, real estate specialists, clerical personnel.

Q. What would be the function of the underground mine inspectors?

Excuse me. What is the function of the underground mine inspectors?

A. The underground mine inspector makes periodic inspection of the mining operations that have been permitted under the Subsidence Act, to determine whether or not that operation is in compliance with its permit and with the regulations.

Q. All right. And how many inspectors are there, sir?

A. Four.

Q. Mr. Alexander, as part of your duties as chief of the section, are you familiar with current literature concerning mine subsidence, ground control and those types of sciences and arts?

A. As current as what is possible to be.

Q. Okay. Mr. Alexander, do you agree with the statement that one of the roles of the Department in the administration of the 1966 Act is to evaluate the support left to protect structures?

A. Yes. It is our function to determine or to evaluate the support plan to be left for a structure.

Q. Now, I guess we want to talk about this in general terms. Since the passage of the '66 Act, has it been the function of the Department to evaluate how mine operators would protect structures mentioned or listed in Section 4 of the '66 Act?

A. Yes, it is. It has been.

Q. And you agree with me that Section 4 structures under the '66 Act were dwelling houses in place on April 27, 1966, non-commercial public buildings and cemeteries?

A. Yes.

Q. Mr. Alexander, did there come a time when the Department, acting through whatever the administrative predecessor of today's section is, developed certain formulas to provide protection to Section 4 structures?

A. Yes.

Q. Could you describe what those formulas are or were?

A. Basically the formula was to—or the design of the support area for a structure was to leave a 15-foot safety zone around the structure, then from that line, down to the coal seam at an angle of 15 degrees. And where the 15 degree angle intersected the coal seam, then 50 percent of the coal was to remain uniformly distributed in pillars in that area.

Q. And between 1966 and the development of what I will call primacy regulations—is that a term that is familiar to you?

A. Yes.

Q. Was that formula or formulas set forth in any regulations of the Department?

A. No regulation, no.

Q. How were they communicated to mine operators?

A. It was distributed as guidelines and recommendations to the mine operators.

Q. Are those the same formulas that have found their way into what we call the primacy regulations?

A. Yes, they are.

Q. And is it a fact that there were copies of the formulas and descriptive material, diagrams, available to mine operators at your office?

A. Yes, that's true.

Q. You didn't happen to bring a set of those with you today, did you?

I didn't ask you to.

MR. HOFFMAN: A set of what?

MR. INGRAM: The 50 percent mining formulas that he's been talking about.

MR. HOFFMAN: Off the record.

(Discussion off the record.)

MR. INGRAM: Let's go back on the record.

Mr. Hoffman, would you, after reviewing them, would you make a copy available to me?

MR. HOFFMAN: I still don't understand what it is you want, though, Mr. Ingram

If you do, I'd be delighted to do it.

Describe it if you would, Mr. Alexander.

THE WITNESS: The formulas and description of the support areas that the Department furnished the coal operators.

MR. HOFFMAN: Okay.

BY MR. INGRAM:

Q. All right. Now, Mr. Alexander, were those formulas and supporting documents distributed to underground bituminous mine operators in Pennsylvania?

A. To the best of my knowledge, yes, all of them received copies of the regulations.

Q. As a matter of fact, that was a tool that was used by the Department to inform the mine operators of what would be required to secure permits when mining activity, underground mining activity, was going to be in the vicinity of Section 4 protected structures?

A. Yes, that's correct.

(Thereupon, Alexander Deposition Exhibit No. 1 was marked for identification.)

Q. Mr. Alexander, I direct your attention to a blowup of a photograph, which has been marked as Alexander Deposition Exhibit No. 1, and ask you if, generally speaking, the diagram indicates how the support formula, the 50 percent support formula, operates as it would be projected down into the mine workings?

A. Yes, it does. It shows the area for support of a surface structure at the coal seam, but it only shows—it shows it as a solid area.

Q. In other words, the red area on Deposition Exhibit No. 1 would be the support area, and then within that red area, the operator would leave 50 percent of the coal in place in uniform blocks?

A. Yes.

Q. In accordance with the formula?

A. Yes.

MR. HOFFMAN: Can I just ask you if the assumption is that the dotted lines from the surface down to the seam are on a 15 degree angle?

MR. INGRAM: Yes. I mean, that's what it is intended to depict.

Also with, I think, the 15-foot safety zone that you referred to.

THE WITNESS: Yes.

MR. INGRAM: Okay.

BY MR. INGRAM:

Q. Now, is it a fair statement, Mr. Alexander, that using that formula, the deeper the seam of coal is, with respect to the surface, the larger the support area is in the underground mine? Is that a fair statement?

A. Yes.

Q. Mr. Alexander, is it a fair statement, is it a fair general statement to say since the enactment of the '66 Act through today, Section 4 protected structures, that the Department has required support for Section 4 protected structures in the manner that you have described?

A. Yes, it is.

Q. So that's the general—if there is a protected structure on the surface, generally speaking, if you have had a chance to review the permit application, the Department has required that 50 percent of the coal beneath that structure in the calculated support area be left in place?

A. Yes. There are some exceptions to that, but that is true generally.

Q. Would you say that the very great majority are—I mean, there are limited exceptions?

A. Yes, that's correct.

Q. Would you have any idea how many exceptions?

A. No, I wouldn't, offhand.

Q. Now, Mr. Alexander, 50 percent mining is permitted beneath Section 4 structures, as long as you follow the formula; is that correct?

A. That's correct.

Q. To your knowledge, have there been instances where subsidence damage has been caused to Section 4 structures, even though the mine operator involved complied

fully with the support formulas in his permit and left 50 percent of the coal in place?

A. I can only answer that as far as the—when the operator had a permit to mine and he complied with the 50 percent mining requirement, I don't know whether or not that in all cases where damage occurred that he fully complied with the 50 percent mining requirements.

But damage has occurred in areas where the operator has intended to leave 50 percent support area for the structure.

Q. Well, are you aware of any situations where an investigation was made by your section to determine whether or not 50 percent of the coal was in fact left in place?

A. Yes, we have.

Q. And did those investigations ever reveal or disclose the fact that 50 percent or more of the coal had been left in place in the calculated support area?

A. Yes, it has. And to the contrary, too, there were less than 50 percent.

Q. You have found instances—

A. Yes.

Q. In those situations where you have conducted investigations, what has been the score? I mean, have there been numerous occasions where there had been less than 50 percent left?

A. Not numerous occasions, but I can't give you any figures or breakdown on the number, but there have been structures—

Q. There have been occasions?

A. Yes, there have been occasions.

Q. Let me ask you this question: Do you happen to know how many Section 4 protected structures have been, since the passage of the Act, of course, have been protected by 50 percent support requirements?

A. Roughly 14,000.

Q. 14,000?

A. 14,000.

Q. All right. And do you happen to know whether or not some of those 14,000 overlies mining properties being operated by Consolidation Coal Company, U. S. Steel Mining Company and Helvetia Coal Company?

A. Yes, some of them have.

Q. And of that 14,000, do you have any information as to how many—despite the fact that there has been the support left in place, or intended to be left in place, there have been claims of damage which the Department of Environmental Resources has supported?

A. Yes.

Q. What is that number, sir?

A. Approximately 300.

Q. 300. All right.

Now, if you know this, Mr. Alexander, in the situation involving these 300 claims that you mentioned, what is the mine operator's responsibility when that situation develops?

A. To make reasonable repairs to the structure, gain from the structure owner a release of the claim, and provide us a copy of that release.

Q. Does your section have a function in seeing to it that this is all accomplished?

A. Yes. Under Section 6 of the Act, the operator, if he doesn't satisfy the claim in the 6-month period after he

knows that a claim has been made, then he's required to place with the Department escrow money to cover the damages.

If he doesn't do that, then he's in violation of his permit.

Q. All right. And I assume that you would have remedies available to you to see that he complies with the Act?

A. Yes.

Q. All right. Now, in establishing the amount of escrow that you just mentioned, is that part of the function of the real estate specialists in your section?

A. Yes, it is.

Q. Now, Mr. Alexander, in the situation where a claim is filed and the Department is satisfied that it's caused by mine subsidence related to a mine operator's underground mining activity, and the escrow amount has been posted, what happens if there is no resolution of the claim for damages?

A. Nothing else happens Department-wise with that claim.

Q. All right. So you just hold on to the escrow amount?

A. We just keep the escrow money until the claim has been satisfied, and then refund it to the operator.

Q. Now, Mr. Alexander, beginning in 1966 and going through October 1980, when the Subsidence Act, '66 Act was amended, did the Department—and when I use the term "Department", I'm really referring to the Bureau of Mine Subsidence Regulation, or the various administrative groups or successor administrative groups—have any role or function with respect to Section 15 of the Act?

A. The only role or function that we had under Section 15—I believe that is the purchase of coal pillars for the protection of the structure.

Q. Yes, right.

A. The only role that we had was that the Department would oversee the appointing of an arbitrator to see that a price for the coal was set, if there was some dispute with the surface owner and the coal operator.

Q. Assuming that the surface owner exercised his right under Section 15 to purchase coal, did that somehow get into the permitting process?

A. No, it didn't.

Q. So you had no way of knowing whether or not there were any structures overlying active mining operations where the surface owner had repurchased support coal from the mine operator?

A. Yes, that's correct. There was no formal notice to the operators that they should inform the Department of any of these transactions that didn't require, you know, arbitration through the Department.

Q. Were there instances where, to your knowledge—well, let me ask you this question; If a structure, for which support had been purchased under Section 15, were damaged, or alleged to have been damaged by underground mining operations and that were reported to the Department, did the Department take any action?

A. We didn't take any action. We didn't have any knowledge of this happening.

Q. So you have no knowledge of that ever happening?

A. No.

Q. Now, Mr. Alexander, did there come a time after the passage of the amendments to the Subsidence Act in 1980, where the Department sought to impose a require-

ment that mine operators limit their mining to 50 percent beneath all structures and features, except those mentioned in Section 4 of the Act, unless the mine operator agreed to compensate the owner of that structure or feature for any damage caused by mining operations?

MR. HOFFMAN: Can you repeat the question?

MR. LLOYD: Have her read it back.

(Record read.)

A. I believe the intent of the Department was that the operator would be placed on notice that if regulations requiring the operator to compensate for other structures other than Section 4, that he would acknowledge the fact that he would do that.

I don't recall that we required the operator to compensate for all, any and all structures.

Q. Okay. Well, that was what has been referred to in various meetings and litigations as the interim subsidence policy, and that's what I was referring to.

A. Yes.

Q. And you are familiar with that; right?

A. Yes.

Q. And there was a period of time when the Department gave the mine operator an option of either leaving 50 percent in place beneath all structures and features, forgetting Section 4 structures, which are treated differently, or agree to compensate for damage under whatever scheme ultimately was imposed by the regulations?

A. Yes, I think that's fair.

Q. And the point was that the Department felt that—or is it fair to say that the Department felt that 50 percent mining was an appropriate method to prevent mine subsidence damage to those structures and features not mentioned in Section 4?

A. Yes.

Q. And in fact, that is the method of subsidence protection that the Department, since 1966, has employed to prevent subsidence damage?

A. Yes, that's true.

Q. Mr. Alexander, directing your attention to Section 15, again, is it your understanding that a surface owner seeking to enjoy the benefits of Section 15 can exercise those Section 15 rights on an unlimited basis?

I mean, he is free to purchase support coal, if he wishes; is that correct?

A. Yes, without the provision of the notification period being put into effect, he can—my understanding of Section 15 is that he could purchase coal pillar protection at any time.

Q. All right.

MR. HOFFMAN: I just wanted to note, Mr. Ingram, that I haven't objected to Mr. Alexander discussing what he thinks the regulations provide. I think if there is any difference between his views and my views as counsel—

MR. INGRAM: Sure. I just want to know what he knows.

BY MR. INGRAM:

Q. In terms of Section 15, is it a fair statement that the Department did not conduct any investigation of these Section 15 proceedings to determine whether or not support coal was necessary to protect structures or make any evaluation whatsoever?

A. Yes. The Department did not oversee it in any way.

MR. INGRAM: May we take about a 5-minute break?

MR. HOFFMAN: Oh, sure.

(Recess taken.)

BY MR. INGRAM:

Q. Mr. Alexander, again in general terms, since the primacy amendment to the '66 Act in 1980, and the development of permanent program primacy regulations, has the Department considered how it will—well, first of all, under those regulations and policies of the Department, as you understand them, will there be additional structures and features which will require protection in the program?

A. Structures in addition to the Section—

Q. —Section 4 structures.

A. —4, yes.

Q. There will be.

Is it the present intention, to your knowledge, of the Department, to employ the 50 percent mining formulas in the consideration of how those additional structures and features will be protected?

A. Yes, it is the intention.

Q. Now, in connection with this additional protection, are perennial streams going to be given additional protection?

A. Perennial streams, if they are a significant source of water supply to the public water system.

Q. Now, that is one category that I think has been specifically mentioned in regulations that are either in effect or will become effective shortly, is that correct, perennial streams that serve as a source of, whatever you said, significant source of public water supply?

A. Yes. To my understanding, they are in effect now.

Q. All right. And for those streams, the Department would evaluate the protection needed, using the 50 percent mining formulas?

A. Yes, that's correct.

Q. Now, do you know, does the Department have any intention to limit underground mining beneath perennial streams that are not a public water source?

A. I don't believe there has been a set policy on other perennial streams at this point.

Q. And is there a definition of perennial streams that the Department uses in the regulations?

A. I believe there is. I can't quote it, or can't direct you to it.

MR. HOFFMAN: If I can be of assistance, I'm told that it is in the definition section at the beginning. Is that right?

MR. RODA: It is in 86. It's in 89, too.

MR. HOFFMAN: Perennial streams are defined in 89.2 of the Pennsylvania Bulletin at page 2532 on July 31st, 1982.

Q. But Chapter 89 of the regulations is the underground mining regulations; to your knowledge, Mr. Alexander?

A. Yes.

Q. And the Department would use those definitions in consideration of permit applications and evaluating situations; is that correct?

A. Yes, that's correct.

Q. All right. Now, let's go back to—well, are you familiar with a press release that was issued by the Department of Environmental Resources on August the 16th, discussing protection of perennial streams?

A. May I see it?

Q. Sure.

MR. LLOYD: What year?

MR. INGRAM: 1983. I'm sorry.

A. I can't say that I am familiar with this.

Q. Okay. So you haven't had any communications from either Mr. Fabian, or any other persons in the line of command up through the secretary, concerning the policy mentioned in the press release that you just looked at?

A. No, not that I recall, no.

Q. Now, with respect to perennial streams that serve as a significant source for public water systems, how will the Department and your section protect those streams?

A. By requiring coal pillar protection, 50 percent mining to protect that stream.

Q. All right. And if, in fact, the Department determines that it will protect other perennial streams, how will it do that?

A. That would be on the 50 percent basis, or if the operator could demonstrate to us that no harm would occur to that stream by full seam mining, then it would be an evaluation in a case by case basis.

Q. But in the first instance, the standards by which you would evaluate that would be your 50 percent mining?

A. Yes, that's true.

Q. Now, Mr. Alexander, I am going to show you a document which I will represent to you as being a proposed stipulation that counsel for the plaintiffs and defendants have been exchanging, and similar to the one that was referred to in yesterday's proceedings, and ask you to read Paragraph 23 of the document.

And could you read it onto the record?

A. All right. Paragraph 23, "Leaving support pillars in place beneath various surface and subsurface features does not prevent subsidence, it only delays the onset of

the phenomenon, because over time the pillars deteriorate and break apart or crush out. Because the pillars do not deteriorate uniformly, leaving pillars in place not only does not prevent subsidence, it often leads to more severe surface damage than would have occurred if all the coal beneath the structures or features had been removed at once, thus causing the surface to subside quickly and in a relatively uniform manner."

Q. All right. And I really want to ask you if you agree or disagree with that statement? If you agree, you may say so, and if you disagree, I would like you to tell me in what respects, to what extent you disagree with it.

And if you want to take some time, please do. You probably haven't seen that.

A. Okay. Well, first of all, leaving support pillars in place and conducting mining operations is about the only method compatible with supporting a structure.

And I believe that it's possible to design a surface support area leaving pillars in place that would protect a surface structure for—conceivably for the life of that structure on the surface, not forever into infinity, but for at least the life of that structure.

Q. But I take it you do agree that over time some subsidence will occur?

A. Yes. It's very possible that subsidence would occur, should occur in mining areas.

Q. Now, would that be so even with the 50 percent mining that we have talked about today?

A. That possibly sometime in the future there could be some sort of subsidence effect on the surface, yes, it's possible with 50 percent, in any 50 percent situation.

Q. All right. Well, when you say possibly, that indicates that it may be impossible, so do you believe that essen-

tially subsidence will occur, then, if 50 percent of the coal is left in place beneath the areas?

A. No, I don't believe that eventually it would occur, because in this statement you're taking all situations into effect, all coal seams, all types of roofs and floors of coal seams, and I don't think it would be a fair statement, that there may be instances where you have a strong coal seam that withstands crushing forces, and the 50 percent coal left in place in properly designed pillars would exceed any safety factor that you might want to apply in this area.

And also, the floor and roof might be of sufficient hardness and stability and other conditions, such as water or air in that mined area that really would, for all purposes, not deteriorate. There wouldn't be any subsidence.

Q. Okay. Now, that is a general statement then.

Have you reviewed any literature that discusses generally what is stated in Paragraph 23, as it relates to either the Pittsburgh seam in Pennsylvania or coal seams in Pennsylvania?

A. I don't believe I've seen any general statement that says in all cases that, you know, this will occur.

Another thing, too, I'd like to bring out, too—

Q. Sure.

A. —that the subsidence is not necessarily more severe where you have pillar failure in the support area. It's not always more severe than full seam mining by longwall.

It can be.

Q. Possibly?

A. It's possible, depending on a lot of other conditions, it could be an effect here.

Q. Mr. Alexander, have you had occasion to evaluate subsidence occurrences associated with longwall mining in Pennsylvania?

A. Yes, I have.

Q. And insofar as Paragraph 23 discusses that, I mean, is that consistent with your understanding?

A. The damage that I've seen from longwall mining has been generally more severe than with failure in a room and pillar support area, or even the pillar extraction where the support area has been extracted by room and pillar means.

Q. And do you agree with the statement that was made by Mr. Dahl yesterday that in longwall mining situations, virtually all of the subsidence that is going to occur—in fact, I think he said 95 percent of it—occurs at or near the time of the complete extraction for the longwall mining, and virtually all of it occurs within a short time thereafter, I believe within six months?

A. I don't know whether I agree with his time frames, but it does—surface subsidence associated with longwall mining does occur shortly after the actual extraction process.

Q. And is it possible to have subsidence damage—let's take a room and pillar situation, and let's take a situation where one of these cases where subsidence damage has occurred, even though 50 percent of the coal has been left in place beneath the structure to be protected, is it possible to have other subsidence events which would cause future damage to that structure?

A. After—say that again, will you please?

Q. I will try to rephrase it. It wasn't very clear, I agree with you.

If you have a subsidence occurrence which causes damage to a protected structure, even though 50 percent of

the coal has been left in place in accordance with the formulas, is it possible to have future subsidence damage to that structure, subsidence damage to that structure in the future?

A. Yes, it is.

Q. And are you aware of instances of that occurring?

A. Yes, I am.

MR. INGRAM: Take one minue.

Mr. HOFFMAN: Sure.

(Discussion off the record.)

BY MR. INGRAM:

Q. Mr. Alexander, are you familiar with Section 7 of the Subsidence Act, as it was amended in 1980, which I believe is entitled "Jurisdiction Enforcement Rule Making"?

A. Yes. Generally, yes.

Q. It provides, does it not, that the Department shall have the power to enforce the provisions of the Act and rules and regulations promulgated thereunder?

A. Yes.

Q. Okay. Now, are you familiar with Section 14 of the Subsidence Act?

A. Yes, I am.

Q. And based on your experience with the Department, virtually throughout the life of the Subsidence Act, has the Department or its predecessor, the Department of Mines and Mineral Industries, ever taken any role in the enforcement of Section 14 of the Act?

A. To my knowledge, we have taken no enforcement action.

Q. Now, I just want to go back to the situation where there is a claim for damage reported to the Department, presumably to the mine operator and the claim is not resolved, or a situation where the Department requires the mine operator to post security, I guess, in escrow.

What kind of security does the Department accept?

A. Cash.

Q. Cash. All right.

A. Only.

Q. That's pretty good security.

And I take it, then, if the claim is satisfied and the mine operator has a release from the owner of the protected structure, then you give him back his—you give the mine operator back his escrow deposit?

A. That's right.

Q. And that presumably means that the mine operator has either settled the claim by the payment of money to the owner of the structure, or repaired it to the satisfaction of the owner of the structure; is that right?

A. Well, it only means to us that he has secured a release from the claimant that releases the operator, then, from any claims that he had under the Subsidence Act.

Q. Okay. And typically, how does that—what is done? Is what I described usually the pattern?

A. That's right, the payment of the money or the repair of the damage.

Q. And the mine operator gets his escrow deposit back?

A. Yes, that's right.

Q. Now, is he paid any interest on those funds?

A. To my knowledge, he is not paid any interest on the funds.

Q. Is it a fact that sometimes those funds are held in escrow for a significant period of time?

A. It is.

Q. What is the longest period of time that you know of?

A. I believe we have some small sums in escrow since 1967.

MR. INGRAM: Thanks, Mr. Alexander.
I don't have any further questions.

MR. HOFFMAN: I don't have any questions.

(Thereupon, Alexander Deposition Exhibit No. 2 was marked for identification.)

MR. INGRAM: After the conclusion of the deposition testimony of Mr. Alexander, Mr. Hoffman furnished me with a copy of a letter which has been marked Alexander Deposition Exhibit No. 2, which is a transmittal letter and the 50 percent mining formulas of the Department, and descriptive material that was distributed to underground mine operators in Pennsylvania.

MR. HOFFMAN: During sometime from 1966 through to the recent present. Is that correct, Mr. Alexander?

THE WITNESS: Yes.

MR. HOFFMAN: And there was discussion on the record previously which identified the document, and Mr. Ingram asked at that time if we would produce that, and indeed it was in the room at the time.

MR. INGRAM: Okay. Thank you.

(Thereupon, at 11:37 o'clock a.m., the deposition was concluded and signature was waived.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Plaintiffs,

vs.

NICHOLAS DEBENEDICTIS, *et al.*,
Defendants.

DEPOSITION OF HILBERT DOUGLAS DAHL

Wednesday, November 9, 1983

VOLUME I

The deposition of HILBERT DOUGLAS DAHL, called by the defendants for examination, pursuant to notice and the Federal Rules of Civil Procedure pertaining to the taking of depositions, taken before me, the undersigned, Sheryl L. Akerley, a Notary Public in and for the Commonwealth of Pennsylvania, at the law offices of Rose, Schmidt, Dixon & Hasley, Tenth Floor, Oliver Building, Pittsburgh, Pennsylvania 15222, commencing at 10:45 o'clock a.m., the day and date above set forth.

MR. HOFFMAN: This deposition is noticed under Rule 30(b)(6) of the Federal Rules, in which we asked the plaintiff corporations to designate individuals on a series of specified topics, and with respect to this deposi-

tion, really, is the past, present and future longwall mining plans of the corporations.

I think we indicated that although we had asked for corporations in the plural, that we were at least content for now to just have the plaintiffs designate one individual from one corporation.

I understand, Mr. Ingram, that you have designated Mr. Dahl for Consolidation Coal.

MR. INGRAM: That's correct.

MR. HOFFMAN: Okay. And if there are questions I get into, Mr. Dahl, that seem to fall a little out of this area that we have designated, and you don't feel comfortable answering, just let us know and we will find someone else who does feel more comfortable answering them.

MR. INGRAM: Bob, could I interject? I just want to enter an appearance and make a little statement. I am Henry Ingram, here representing the plaintiffs in this action, and I would like to indicate at this time that although the notice of deposition, indicating the areas of inquiry, does not necessarily indicate areas of sensitivity, it may be that the inquiry will delve into certain matters which Consolidation Coal Company consider to be commercially or competitively sensitive and of the nature that we would request protection from the Court, so that that information would not be disclosed to the public, or others who are not necessarily involved in preparation for trial, and in certain circumstances, to other of the plaintiff companies, insofar as that information is competitively sensitive.

Therefore, without wanting to unduly interfere with the conduct of the deposition by Mr. Hoffman, I merely want to state that I'm reserving my right to raise appropriate objections at the appropriate time, and we will try to cooperate in every way possible in having the deposition proceed without undue difficulties.

MR. HOFFMAN: Sure.

That much to the side, shall we have the usual stipulations, Mr. Ingram?

MR. INGRAM: Yes.

MR. HOFFMAN: And if there does seem to be a problem with information that you think is commercially sensitive, I want you to advise your counsel and we will try to deal with it in a reasonable fashion.

HILBERT DOUGLAS DAHL

called as a witness by the defendants, having been first duly sworn, as hereinafter certified, was deposed and said as follows:

EXAMINATION

BY MR. HOFFMAN:

Q. Mr. Dahl, I am just going to ask questions. If you don't understand them, please ask me to clarify them.

I am not an expert in mining or subsidence, and beg your indulgence in what will be some fairly silly questions, I'm sure.

If you do answer them, I'll just assume that you did understand them.

Would you please just start by giving us your position with Consolidation Coal and outlining your responsibilities?

A. Currently I'm executive vice president of engineering, exploration and environmental affairs.

This position relates primarily to the future course of action the company will take with respect to mining, as much as I'm responsible for finding, purchasing or otherwise acquiring coal reserves for the company, and I'm

responsible for developing economics and mine plans for all new major projects that might be conducted on these properties.

Also responsible for conducting those operations in an environmentally acceptable manner.

Q. So the individuals within Consolidation Coal who actually draw up the mine plans work for you, for example? At least within your line of authority?

A. That is correct.

Q. And do you review and approve mine plans before they are submitted, for example, to the Department of Environmental Resources?

A. Not normally.

Q. An individual who works for you does that?

A. No. That can happen, but in general what would happen is I work for the central office and I'm responsible for all new mines and major expansions of existing mines.

Those mine plans might be submitted to the DER at the appropriate time, but they would be submitted by an operating region.

In this case, it would be Consol's eastern regional office that would submit it. Some of my people would work on the material that was submitted, but the actual submission would come out of the eastern region office.

Q. And somebody within the region has the ultimate authority to sign off on that plan before it is submitted, not yourself?

A. Yes.

Q. Okay. But are major type decisions regarding the method of mining operation, for example, should Consolidation move into longwall, or should it apply longwall

mining methods in a particular mine, is that the kind of decision that you make or are involved in?

A. I certainly would be involved in it and would be a prime mover.

Obviously, all decisions go to the board, of which I'm a member and so forth.

A longwall investment, for example, is a major capital expenditure. It has to be budgeted, approved and so forth, and that decision would go before Consol's management committee, of which I'm a member.

Q. Now, the third piece of your title was environmental affairs.

A. Yes.

Q. I ask if you could describe what comes within that?

A. Well, for all new projects and major acquisitions, it would involve preparation of permit applications to agencies like the DER.

It would also involve—we do an awful lot of what would be termed environmental services work, in which we do service work for the operating regions with respect to compliance, environmental compliance.

We also have what you might call an environmental auditing group, which does auditing work for Consol to assure that internally we are in compliance with both federal and state environmental regulations.

This is done across the company from the main office.

Q. So the main office establishes policy, if you will, which it then gives it to the region, the operating companies to apply and implement?

A. That is correct. And we also audit those programs from the main office.

Q. Okay.

A. With respect to environmental affairs.

Q. Does environmental affairs include within it the topic of mine subsidence?

A. Yes, it does.

Q. As well as other—okay.

And is it your office under the heading of environmental affairs that determines or alternatively is involved in determining Consolidation Coal's position with respect to regulations or statutes or proposed regulations or proposed statutes?

A. They assist.

Q. Your office assists?

A. No. I have three departments that work for me, engineering, environmental, exploration.

The environmental group would assist, in terms of what the regulations state, how they are enforced and so forth.

They do not, by themselves, you know, make policy decisions. They make some policy decisions, minor nature.

Q. For example, as we know from this litigation, there are various regulations of the Department of Environmental Resources that Consolidation Coal has expressed its displeasure with.

Is that a policy decision that Consolidation has posed to some of those regulations made and/or developed within your office, people working for you?

A. Well, we're certainly a prime mover. The decision of whether or not to proceed in conjunction with the KBCA is one that I do not make alone.

Q. Okay. I understand that.

Does your central office under you also assist or develop standardized procedures that might be applied by

the operating divisions, in terms of how do you plan a mine to avoid subsidence, or minimize subsidence, for example?

A. Are you asking whether the environmental affairs group does this, or are you asking whether I do this?

Q. Whether you do, sir, or the groups within your jurisdiction.

A. We do not prepare, in my office, for example, mine plans relating to the '66 or '81 Subsidence Acts of Pennsylvania.

Rather, we—we just don't do that.

Now, I guess I'm not certain what your question is.

Q. I guess I'm—let me just ask it a little differently. Has Consolidation done any studies, analyses and the like on mine subsidence?

A. Many.

Q. Okay. Are they done by people within your division?

A. They are—one time in my career I was in charge of the mining research division, which does R&D activities for Consol. That division does more of the technical aspects of mine subsidence, what the impact is on the surface from longwalking, continuous and partial extraction methods of mining.

That's really not done by the main office in Consol, except to say that we certainly look at the results of the activity, analyze it with respect to our plans and so forth.

Q. And has the mining research division done a study that compares or analyzes subsidence effects of longwall mining, possibly, to subsidence effects of other types of mining?

A. Yes.

Q. And when would that have been done, sir, to the best of your recollection?

A. Yes, to the best of my recollection, really, that job began in about 1971, '72 and continued—really continues to the present to some extent, but the meat of the work was done in the mid '70's.

Q. Is there a particular report that you have in mind as you are describing it?

A. Well, there are a number of reports, internal reports, some of which have been published on the outside.

Q. I want to ask Mr. Ingram to produce some of those for me. How should I describe them?

A. You should ask for, one, all reports that the company has written that have been published.

Really, most of what we have done has been published.

Q. On subsidence?

A. Yes.

Q. And I assume there are some that have not been published?

A. Yes, there are a number of them that haven't been published, but they are—there is really nothing different in those over and above what has been published.

The published stuff is, you know, as assimilation of all the unpublished reports.

MR. HOFFMAN: Can we just discuss some production on that when we are done with this, Hank?

MR. INGRAM: Certainly.

MR. HOFFMAN: Thanks.

THE WITNESS: Many of them I'm the author of, incidentally.

BY MR. HOFFMAN:

Q. Okay. Let's go back a bit and ask you if you will just summarize your educational experience, and then your work experience before you became executive vice president.

A. Educational experience, I have a bachelor's, a master's and a doctorate in mining engineering from the Pennsylvania State University.

The master's and doctoral programs focused on ground control, and specifically several problems in subsidence.

The work experience, I started with Consol's parent company in '69 as a research scientist in the area of ground control in their mining research division.

I left in 1978. I had several promotions and I left as manager of the mining research division, came to Consol as director of underground mining engineering, at which time I was responsible for laying out all of the plans for the major projects, which we are talking underground mines.

I then became vice president of exploration in '79.

1980, I was named vice president of operations for the Moundsville Division of Consol.

Q. For which one?

A. Moundsville Division. That's in West Virginia.

I returned to the main office in September of '82 with my present position.

Q. So you have been with Consolidation throughout your professional career since 1969?

A. That's correct.

Q. Within Consolidation, are you either the expert on mine subsidence, or one of a small group of individuals who you give that term to?

A. If you include the R&D folks, I'd be one of three or four.

Q. Okay.

A. I probably have more—a longer time span involved with it, but I'd be one of three or four.

Q. Now, we don't have the reports here, but let me see if we can just ask you in a general way, if you can, to describe the conclusions that you reached, based on your research as to subsidence effects of longwall mining.

Can you do that?

A. You want longwall by itself without respect to other methods?

Q. Well, let's start with longwall, and then we will just compare it to room and pillar.

A. Okay. Well, that's a very involved subject, but I guess the—if you consider time effects with longwall mining, you can basically say that subsidence that occurs over longwall mining is independent of time.

Q. What does that mean? I've seen the phrase.

A. Which is to say—yes. Really what it's to say is it depends solely on mining activity.

As mining activity progresses, so does subsidence on the surface.

As mining activity stops, subsidence on the surface stops.

That means that the phenomenon, in essence, is time independent. It only relates to time as far as mining activity is concerned, not some time dependent material behavior in the overburden.

Q. That doesn't mean that the day the mining stops, the subsidence stops, necessarily?

A. Yes, it does. 95 percent of the motion with longwall mining occurs within some 24 hours after mining.

The other 5 percent might occur over a few months, but it's rather minor in nature, relative to the first 95 percent.

That feature is somewhat unique to longwall mining.

Secondly, we found that there are many technical aspects. We found that, roughly speaking, some 50 percent of the extraction thickness underground is expressed in vertical subsidence on the surface.

That will vary somewhat with the depth of cover, width of extraction panel.

Q. In simpler terms, that means if the seam is eight feet thick, for example, that the maximum you would expect would be about four feet of subsidence?

A. Four feet, that's correct. That would range somewhat, but that's a good rule of thumb.

Q. The deeper the seam is from the surface, the smaller the ratio would be, is that correct, other things being equal; if you can say?

A. Other things being equal, that is correct. In other words, if the width of the panel stays the same, what you have said is correct.

Q. Okay.

A. Thirdly, that we found that vertical motion over an extracted longwall panel is independent of surface topography, which is to say it doesn't matter whether it's flat or it's on hills, basically the subsidence pattern that you get on the surface, in terms of vertical motion, is independent of topography.

Q. Let me just see if I can put together points 1 and 2, which is—

MR. INGRAM: Before you do that, let me just interrupt for a second.

MR. HOFFMAN: Sure.

MR. INGRAM: To make a clear record, it might be useful to inquire as to generally what locations Mr. Dahl may be talking about, or whether or not this is consistent with the whole thing, because this case involves Pennsylvania and it might be helpful on the record if—

MR. HOFFMAN: If you feel a need to qualify what we're talking about to the specifics of Pennsylvania, please do so and feel free to go back and do that to the three points you have made.

If there are general points that run through, then let's treat them as generalities.

THE WITNESS: I would not change these conclusions with respect to Pennsylvania.

MR. HOFFMAN: Okay.

BY MR. HOFFMAN:

Q. Let me go back, then, and put together points 1 and 2, which is that—again, is an eight-foot seam a reasonable number to start with, by the way, or should we—

A. Typically one would not quite extract that thickness. It would be more like six, seven feet.

Q. So if we are talking a seven-foot seam, 50 percent of that is $3\frac{1}{2}$ feet, and we can expect 95 percent of that, so 3 feet, or a touch more, of subsidence within 24 hours?

A. Yes, although I would shade it slightly less than that. I would say normally you would expect between 3 and $3\frac{1}{2}$ feet, and 95 percent of that would occur within the first 24 hours—

Q. Okay.

A. —of mining.

Q. Fine.

A. Now, that is an incorrect—let me—what you have on the surface is not a single point that moves in 24 hours 3 to $3\frac{1}{2}$ feet.

Rather what you have is a whole series of points that, as mining progresses, will go from 0 motion to $3\frac{1}{2}$ feet. And when you stop mining, it might take, because mining takes 2 months to progress, it might take 2 months for a single point—it wouldn't be 2 months. It would be more like a month. It might take one month for a point to progress from 0 displacement to 3 feet. Okay? Just due to the fact that the mining is moving underneath them.

Q. At a slow rate, at the rate of one month?

A. It takes one month, perhaps, to mine enough that you have incurred the 95 percent. The point being that at any point in time, that if you stop the face, whatever motion has already been incurred at a single point represents 95 percent of the motion that will be incurred.

Q. Okay.

. . . .

solid pillars left surrounding the longwall panel.

That is not true if you have panel after panel after panel. In other words, if you have adjacent panels, that statement is not true. You get a fair amount of displacement between panels.

Q. But if you maintain solid pillars between the long wall panels, you would think that the—your conclusion is that the horizontal displacement is not significant in any way?

A. No.

Q. I'm sorry. If I didn't get you right, try to straighten me out.

A. In terms of horizontal displacement, I thought you asked the question generally whether all displacement was confined with or what the extent of all displacement was with respect to the solid side of a longwall panel, and there most of the displacement that you will incur will be inside the panel. Some will be outside.

You get some vertical motion over the edge, a slight amount, and you get significant tensile strains over the edge.

And we have actually measured uplift, in other words, vertical motion upward, back over the edge of the solid.

Q. What is the significance of significant tensile strains over the edge?

A. Well, this is not unique to longwalling. It's true in all extraction methods. Any concrete structure, including footers, cannot withstand tensile—very much in the way of tensile strength. And for that reason, the tension zone, which starts at about .15 times the depth, I think is the number, although I would be going back some years in memory on this, inside the panel edge, extends some distance outside the panel edge, depending on the accuracy of your measuring technique.

Q. Have you reached any conclusions—again, we are talking about subsidence in longwalling and the research that we have been alluding to—on what we will call the uniformity of the vertical drop?

A. Well, there is no question that but due to the method of mining, which requires that you remove all of the coal in a uniform fashion and in a specific geometry, there is no question but what the subsidence patterns that are generated as you mine are much more uniform and much more predictable than they are with room and pillar mining.

They also occur at a very predicted time—point in time. So they are quite uniform, pretty well predictable, and once they are done, they are done.

In other words, they—

Q. If we can know, based on what you have said above, and again, correct me if I'm wrong, when we talk about predictability, that we know that at about 50 percent, give or take a touch, of the extraction will be expressed in a vertical subsidence from the surface, and that 95 percent of that will occur within 24 hours of when you really finish that section; is that right?

A. That is correct.

Q. Are there any other conclusions you have reached on subsidence effects from longwalling?

A. Not without going back to reports, I couldn't—those are the major ones I remember.

Q. Okay. Whatever is in your reports, do you stand by it today?

A. Yes. I have no reason to change anything that's in them.

Q. Okay. I just asked that so if Mr. Ingram can provide me with some, and I read it, I will just have a sense that that's what you think is correct today.

A. Yes.

Q. And if there are exceptions to that, maybe just ask Mr. Ingram to let me know. Okay?

A. I can't guarantee every conclusion in those reports, since they occurred over a period of time in which we were undergoing a learning process.

The reason I'm asking, I can't guarantee that every conclusion in there is one I would say, "Yeah, that's absolutely right."

Q. I guess what will happen, that if I want to use them and I use some language that Mr. Ingram shows you and you say, "My gosh, that's something I thought in 1962,

that's not right anymore", you will have an opportunity to say that. Okay.

Let's go on now and ask if you can compare the conclusions you have reached on subsidence from, let's say, continuous room and pillar type mining.

A. Where pillars are extracted?

Q. Yes.

A. Okay. Let me back up just a minute.

If you would conduct room and pillar operations in the exact same fashion as you do a longwall, from a rather gross sense, which is to say that you remove your pillars and remove all of them, there are no remnants left, no fenders or anything else, there would be really no difference between room and pillar mining and longwall mining with respect to subsidence impacts.

However, my point is that you cannot do that in room and pillar mining. What happens is underground you run into circumstances where you get bad top, you don't have the protection of shields over top of you. You have to leave it, and so you end up leaving pillars here and there, which causes a time dependency in terms of motion to occur.

It also causes the motion to be irregular on the surface, and it's really related to your ability within the mining technique to mine in the uniform and consistent fashion that longwall does.

Room and pillar cannot. Therefore, it's irregular. It's time dependent on the surface, and you can't use the rules of thumb, generally speaking, that I referred to in longwalling. Those rules of thumb no longer can be, strictly speaking, applied.

Q. For example, the 50 percent ratio we talked about earlier?

A. It would many times be 50 percent, but there are other times in which it would not be.

You would also have many—

Q. Typically be less or more than that; if you can?

A. It would either be less than or equal to. However, you would have far more extensive tension zones on the surface, generated with pillar movement, because you leave pillars in place. They would create a tension zone in the surface, which tension zone may or may not be removed down the road as that pillar collapses and crushes out.

So there would be an irregularity in terms of both vertical motion and horizontal strains.

Q. So it's clear what we have been talking about in room and pillar extraction, that's the situation in which pillars are left in place as support during the development phase of mining, and then certain of the pillars are pulled out, they are themselves mined as you retreat?

A. That is correct. And generally you would set up a situation in which you try to mine most, if not all, of the pillars that are remaining.

But as a consequence of uncertainty in terms of conduct of the mining operations, you never get it all. You always leave something behind.

Q. As you retreat?

A. As you retreat, you always leave some coal behind. Sometimes you have to leave large blocks. Sometimes they have to be small blocks.

Many times you get—it's desirable to get a good cave and a good subsidence trough when you're doing this kind of operation underground, because it tends to relieve pressures on the active working, but you can't always do it. Sometimes it just gets too dangerous, too risky, and so you will leave coal in the ground and start again.

Q. Now, the third type of mining I want to ask your thoughts on, if you have any conclusions on with respect to subsidence, is what I'll call the 50 percent mining.

Let's just make it clear what we are talking about. That's the rule that DER has applied as to certain types of structures in which you must leave 50 percent of the pillars constituting 50 percent of the coal underneath those structures in an area that extends somewhat beyond the actual boundaries of an angle of draw which is 15 degrees or 25 degrees?

A. 15 degrees.

Q. Okay. So is that a common understanding of 50 percent mining? You know what I'm talking about?

A. Within broad terms, I know what you're talking about, although the geometry of the pillars can change and so on and so forth.

Q. Sure.

A. Generally speaking, what will happen is that you, over a—I have to qualify it in terms of two circumstances. One circumstance is in which the entire mine is mined on a partial mining scheme and there are not pillars removed anywhere, okay?

That happens in certain parts of the country and in Pennsylvania.

Q. Now, when you said partial mining, what do you mean?

A. I just mean you mine 50 percent, you never pull pillars anywhere.

Q. Okay. So the entire mine is 50 percent mined?

A. Correct.

The second circumstance is one in which, pursuant to the DER circumstances, the 15-degree plus standoff circumstance is where you will mine up to an area, you

will leave 50 percent of the coal in place in that area, and then you go beyond it.

Those two circumstances are somewhat different.

Q. So the second one is a situation which you have standard room and pillar full extraction in certain of the portions of the mine, and 50 percent mining in others; for example?

A. That's right. Is that the—you want to confine my answer to that issue?

Q. Sure. Why don't you give me both situations?

A. All right. I'll give you the second one first, which is the DER one, then.

In mining underground, I think it can be fairly stated that all mining will cause subsidence, and that it is only a question of what—in what time you incur the vertical motion.

Pressures underground are so large that nature will fill that void. It's only a question of when.

The 50 percent mining that we're leaving under certain structures will some day result in vertical motion over that 50 percent mining.

I've seen it occur in as little as 8, 10 years after mining, and I've seen it occur as long as 50 or 100 years after mining, at least if you look at the old mine maps.

Q. Which would seem to you to be the more common number?

A. I don't think our experience is enough to say, to make a statement like that. I wouldn't know enough about it to make any kind of a rule.

Q. So you would not have an estimated lifetime for which the support would be sufficient?

A. I couldn't give you one, no, no.

I can only say that in certain circumstances it has been as low as eight years.

Q. Okay.

A. In others it's obviously lasted longer than 50 or 100.

Q. From the way you are describing it, I'm getting a sense that you have seen some that are eight to ten, but that's somewhat the exception to the rule, or that's on the far end of the curve, if you prefer it that way?

A. I would say—of course, I've not seen all instances, either, but the ones that I've been exposed to, yes, I'd say that that's on the lower end of the spectrum, yes.

Q. Okay.

A. Let's see, I would also just make a simple observation, in terms of history of subsidence and the legislation in this state, and it's merely an observation, I'm not saying this as a technical witness, but I guess I'd like to say it.

I would believe that the subsidence legislation that we have on the records today is a result of partial mining that was done back around the turn of the century and in the '20's.

In other words, the '66 Act was written historically as a result of agitation that occurred as a result of old pillars being crushed out many years after mining.

So enough said, I think.

Can we break for a minute?

Q. Oh, sure.

(Recess taken.)

A. In describing the subsidence effects where you have areas that are mined on both sides of an area that is mined at an extraction ratio of 50 percent, I had answered the question really with respect to crushing of

pillars and/or failure of the bottom underneath the pillars with respect to the eight to ten year time frame and subsidence that might occur as a result of losing those pillars and/or squeezing bottom.

There is another issue, and I didn't bring it up, and that is that if you mine on all sides of an area that is extracted at 50 percent, you get significant subsidence impacts over that area immediately and within a period of months over top of that area.

Q. Which area?

A. The area that is mined at 50 percent. In other words, the so-called protected structure area.

Q. And in your view, that's the result of mining around the protected structure?

A. That's correct.

Q. Is that another way of saying that the angle of draw is not wide enough, or something along those lines?

A. Well, it's a way of saying that you get a superposition of effects from multiple solid abutments that occur around, say, a single structure, for example.

Q. And are you saying that, for example, Consolidation Coal had experienced subsidence causing damage to protected structures in some significant quantity, notwithstanding the 50 percent mining requirements?

A. I can't answer the question with respect to significant quantity, but we have had situations of damage with respect to protected structures, yes.

Q. I understand your leanness to use my word "significant." I guess I would like you to give me a quantity, if you could.

A. I can't.

Q. Is it an unusual incident? Is it the normal incident? Is it the everyday incident?

A. I couldn't characterize it as everyday. It's unusual, for example, to have single structures which you have extracted on all four sides, so that's kind of the worst circumstance.

Q. Okay.

A. But all I'm saying is it does occur. But to get an immediate subsidence effect to the building, and perhaps the facilities that serve the building, water lines, power lines and all that sort of thing, over the solid that you have extracted, and secondly, you do leave in the ground, you might call it an environmental liability, some day the pillars or the bottom underneath the structure are going to fail and you are going to get subsidence impacts down the road.

Q. Okay. Let's turn to a different topic now, if we can, and that is I want to talk for a bit about the origin of longwall mining, both generally, if you know it, and specifically as to Consolidation Coal.

Let me just see if I can speed it along by saying my sense of things, from what I've read, is that longwall began to be used most recently in the United States sometime in the '60's.

Fair statement?

A. Not really.

Q. Then you—

A. If you want to be a purist, I think that there was a longwall face installed back in 1917 or 1923. It did not have all the modern accouterments of equipment, but there have been instances where people have tried longwall mining back in the early 1900's.

Q. I stated my question most recently because I read somewhere that there was a little bit of longwall back in the 1800's somewhere.

A. In England.

Q. But I meant the phenomenon as we describe it now.

A. As being a significant part of mining activity for Consol, I would have to say we didn't put our first longwall in until 1971. So all of it is within the last 12 years for Consolidation Coal.

Q. And what would the first one have been?

A. Blacksville, Blacksville, which is a mine that straddles the Pennsylvania-West Virginia state boundary.

Q. Is that Blacksville No. 2?

A. I believe the first wall went in Blacksville No. 1. We subsequently put two longwalls, and Blacksville No. 2, both mines are on the Pennsylvania-West Virginia border.

Q. Do you submit mine subsidence permits to Pennsylvania with respect to Blacksville—

A. Oh, I'm sure we do.

Q. —or to West Virginia?

A. No. On the surface it would go to Pennsylvania.

With respect to mining law, the mines are under the State of West Virginia, in terms of underground mining law, but with respect to the surface subsidence, I'm certain we have permits filed with DER.

Q. I want to show you something which may just help us out for a moment, which I will show it to your counsel. It is just a census of longwall operations in the United States during 1979. It's an excerpt from Ramani, and I'm just wondering—it has got a couple lists on Consolidation.

What I wanted to—and what it shows by four or five different operating groups, various longwall mine installations that Consolidation had.

It purports to show the year of installation, initial face installation for each.

Are you with me?

A. Yes.

Q. Okay. I guess my question to you is really just: Does that look generally to be accurate, which is to say the first mine face it shows, it says, 1972.

You said 1971.

A. It was installed in 1971. I think the first significant production was '72.

Q. I'm not quibbling the year. It doesn't trouble me.

It shows just a pattern of—it shows the subsequent mines being developed mostly 1976, '77, '78, '79.

Does that seem about right to you, sir?

A. It's fair to characterize what Consol has done with respect to longwalling, that the mid '70's is where we really made a major commitment to put all of our mines, as many as we could, in the longwall category, simply because we couldn't afford to continue to mine with a continuous miner.

MR. HOFFMAN: Off the record.

(Discussion off the record.)

THE WITNESS: I'm certain what happened here is we put a new face in Blacksville 1 in '79, a second face in the same mine.

MR. HOFFMAN: Okay.

BY MR. HOFFMAN:

Q. But in any event, the earliest longwall operation that Consolidation has used was in 1971, at what you believe is Blacksville No. 1, and it has subsequently

added new mines to longwall throughout the mid and late '70's, primarily?

A. That is correct. That is correct.

Q. Now, what this shows, and tell me if I'm correct, is that with the exception of the Washington operations, that all the mines are in West Virginia?

A. No.

Q. That's what it shows, isn't it? And then let's see whether that's right or wrong. Okay?

A. Okay. That is what this list shows, yes.

Q. And is that wrong, you are suggesting to me a little bit?

A. Well, I'm suggesting that three of the coal mines in West Virginia mine coal on the Pennsylvania side of the mine.

Q. Okay. And is it correct, though, I think that you said earlier that with respect to the deep mine operations of those mines, they are within the jurisdiction of West Virginia?

A. With respect to the non-subsidence issues, yes.

Q. But subsidence is Pennsylvania on those; is that right?

A. Yes.

Q. Is Consolidation's involvement in longwall operations substantially similar, that is, with respect to the date and extent of it, to other companies that are operating in Pennsylvania, as you know it?

Anybody in there earlier than you?

A. Oh, yes.

Q. Who would that be?

A. Bethlehem Mines. Bethlehem Mines was in earlier than we were.

Q. Okay. And I know about that one.

Leaving that aside, any others that come to your mind?

A. I really don't know for sure that there hasn't been someone else that beat us to longwall in Central Pennsylvania, like R&P or Barnes & Tucker. I can't answer that.

Q. Okay. Is it the typical pattern, though, that most of the longwall operations that Pennsylvania corporations, or corporations are mining in Pennsylvania, are something that began in either the late '60's, early '70's?

A. Yes, I would characterize it that way, yes.

Q. Mr. Dahl, the mine we were talking about at the end that was reflected as being in the Washington County operation, called the Westland Mine, in which you did some longwall, am I right that over the area that you were doing longwall, that you had acquired all of the surface rights subsequent to 1966?

A. Surface rights?

Q. The rights to surface support, where you learned—hold on a second.

(Discussion off the record.)

MR. HOFFMAN: Strike the question for now. No problem.

BY MR. HOFFMAN:

Q. Okay. Let's turn now to—I'm going to ask you, if you can—strike that.

With respect to the longwall operations that Consolidation has conducted in Pennsylvania, have you done any analysis of subsidence damage from them?

A. The answer to that is yes, although I would characterize our work as more relating to the mechanics of subsidence and how much deformation you get on the surface and so forth, as opposed to subsidence damage.

In other words, analyzing—taking a look at a building and mining under it, that sort of thing, a little of that, yes.

Q. Have you had various structures on those overlying the areas that you have longwalled?

A. Yes.

Q. Have you had any what we call Section 4 structures over them?

A. I'm sure we have, yes.

Q. Okay. And you were—

A. I cannot give you a specific, but I'm certain we have Section 4 structures.

Q. And you were able at that time to get a permit from DER to do that mining?

A. Yes.

Q. I have to assume you did, you did the mining?

A. At Westland, yes.

Q. Can you tell me, as a general matter, with respect to what I call full extraction room and pillar, that is coming back and pulling out the pillars, what percentage of coal can be recovered?

Are there industry standards on that?

A. I wouldn't call them industry standards. I can give you what our experience is. And you have to characterize the recovery—it's easiest for me to characterize the recovery as far as specific extraction of panels and not the entire mine, because you leave coal in place in the entire mine for many reasons, but as protecting main lines, barriers for bleeders and so forth.

I would say that our experience, particularly in Pennsylvania, with respect to extracting coal in panels with

the room and pillar method, our recovery would range in the roughly 85 percent range, in terms of the coal that was intended to be removed by room and pillar methods.

It would range between, however, 70 to in excess of 90. It could be as low as 70 and as high as 90.

Q. Let me make sure I understood the definition, which was as a percentage of coal intended to be removed, what is excluded from that definition?

A. Well, many times you will leave a row of pillars in place between the previous panel and this panel to establish ventilation, or whatever, so you didn't intend to remove that row of pillars, so I'm not counting it. Okay?

If you have a gas well that you're leaving support around the gas well, and you didn't intend to remove those, I'm not including that in that 70 to 90 percent number.

Q. Do you include, for example, barriers, or not?

A. Do not include barriers. Most people express recovery in terms of the entire mine.

For a room and pillar operation, you might get something like 50 percent of the entire mine recovered.

For longwall, you might get something like 60 to 65. That would include all coal left for barriers, main line and all that sort of thing.

Q. I want to go through those with you in a minute.

So when you gave me the 85 percent figure, what you're really saying is you designed this mine, you knew what—or you thought you knew what coal you were going to have to leave in place for various engineering and other reasons.

You put a figure on that, and then when all was said and done, you got 85 percent of that?

A. No.

Q. Sorry. Try me again, then. Explain it.

A. When you lay out a coal mine, there is a certain amount of coal that you're not going to get, regardless of whether it's longwall or continuous.

That coal includes barrier coal to protect the main line. It includes boundary coal that you leave to separate yourself from another coal mine.

It leaves support coal that you have to have around gas wells, so on and so forth. There is a lot of coal that you know you're not going to get, regardless of how you extract the coal from the face.

When you lay out a mine for room and pillar mining, most of the extraction occurs in an area known as a panel. And I'm saying that the recovery in those panels might range between 70 and 90 percent for room and pillar mining, where pillars are removed, whereas it would be a hundred percent in those panels for longwall.

And both of those figures refer to the amount of coal that was intended to be pulled from those panels.

Q. Okay. So—

A. Not from the entire mine.

Q. All right. So what we are saying, and I apologize because I'm really a novice, but what I'm saying, within the area of the mine that you intend to mine, and we will call that the panel, that in long wall you would take that entire panel, or 100 percent, and in room and pillar it would be somewhere between 70 and 90 percent?

A. Sure.

MR. HOFFMAN: Can we take about a two minute break?

MR. INGRAM: Sure.

(Brief break.)

BY MR. HOFFMAN:

Q. Mr. Dahl, is there any way to relate the area of the panels within a mine to the overall boundaries of the mine; that is, the overall acreage?

MR. FASSIO: Of the longwall?

A. Yes.

Q. Can you do it? I mean, what is the normal situation, if you can give a normal situation?

A. I don't believe you can characterize something in coal as normal.

Q. Well, with respect to the mines of Consolidation that you have knowledge of, is a better way to do that.

A. Well, if you're planning a coal mine and it's a longwall operation, for example, you set up specific geometries with respect to the boundaries, the access openings, many other things.

And once those things are set up and you begin your operation, you really cannot change it. You're pretty well fixed.

In other words, you make a long term mine plan, maybe it's 30 years, or whatever, but once you have cast the die in longwall operations, the die is cast, it would cost an enormous amount of money to change it.

It would be impractical.

It's not really true for a continuous mining operation. You have more flexibility in terms of where you go.

Q. By "continuous", what do you mean, room and pillar?

A. Room and pillar, yes, you can change where you're going.

However, you know, the costs of a continuous mining operation with room and pillar working are enormously higher than they are for the longwall, and so we have

not been able to justify a non-longwall operation as a new coal mine in our company for some eight years now.

Q. Okay. But I think—I don't know if you answered my question. Did you?

A. Well, you asked about the boundaries.

Q. Well, I asked how you would—for instance, we have up on the wall there a map of sorts that Mr. Ingram brought along that shows a map, and I assume that those are boundaries of the mine that is shown on the outside in orange.

A. No. They may be. This may be a boundary (indicating) and this may be (indicating), but this is not (indicating), I don't believe, and these are not boundaries here (indicating).

Maybe these are both boundaries (indicating), I don't know. Not all three are boundaries.

Q. I'm using it just as an example. I guess I'm trying to get a sense from you—we see panels are in blue and white; correct?

A. Yes.

Q. If we were going to compare the acreage of the panels to the acreage of the mine, what sort of ratio would you get?

A. Oh, my, I never had reason to do such a thing.

Q. That's the question I asked you before. If you can't do it, I don't want you to do it.

A. No, I can do it. Take the Bailey Mine, which is planned and under construction in Southwestern Pennsylvania. I may be off by a few thousand acres, but the first mine is probably between 15 and 20,000 acres of coal lands.

A longwall panel—can I do some back-of-the-envelope calculations?

A longwall panel, a single longwall panel, not including the entries outside of it, would be, in round numbers, 90 acres, a single panel.

Q. And in the Bailey Mine, covering the 15 to 20,000 acres, how many panels do you contemplate?

Then I can multiply to get the ratio, I guess, that I'm looking for?

A. Well, I can tell you what the ratio is.

Q. Okay.

A. If that's what you're looking for.

In any new mine, or any existing mine where the primary method of extraction is longwalling, and you're just developing for the longwall with continuous miners, the ratio of continuous miner to longwall coal is one third-two thirds.

In other words, two thirds of the production from the mine will be longwall coal and one third will be continuous miner coal.

Q. And again, by "continuous miner" we mean room and pillar?

A. Yes, but no pillars are extracted by the continuous miner.

Q. Will those pillars be left in place permanently in those mines?

A. Yes.

Q. And the ratios refer to the acreage of the mine or—

A. Refer to tons.

Q. The tons.

A. The acreage would not be a valid comparison, because you are doing partial mining with the continuous miners and full extraction with the longwall.

The acres, I have never calculated it, but they might be roughly equal.

Q. I want to make sure I understood what you just said, which is that in a newly developed mine in which the primary mining technique would be longwall extraction, that approximately one third of the coal in that mine would be removed by continuous mining and room and pillar operation, and—

A. Rooming operations. Using the strict definition of a room and pillar operation, you will find most textbooks refer to a room and pillar operation as mining rooms and then extracting pillars.

Q. Here you are going to leave the pillars?

A. Here I'm going to leave the pillars. I would have to call it only a development machine or a rooming machine. It is not a room and pillar operation in that classical sense.

Q. And two thirds of the coal in that mine would be removed by the longwall, as you have been describing it?

A. That is correct.

Q. And in terms of the acreage of the mine, it would be about 50-50?

A. I've never calculated it, but it would have to be somewhere in that ballpark.

Q. Well, the rooming section would have to be more than one third, because it's really pulling out less coal, isn't it?

A. It's about half the recovery of the longwall, so if you multiply it—I don't know, it might not be quite half and half. I've never calculated it.

Q. Okay.

A. But you could compute it from the numbers I've given you.

Q. I think we also asked the questions in interrogatories that will give some similar information, I think, but we'll see.

Why is it, sir, that in a longwall operation you would be removing one third of the coal by the rooming process, as you described it?

A. It is necessary to outline the block of coal being mined with a series of mine entries in order to set up the supplies and ventilation and so forth for the longwall panel. And in doing so, you do that with a continuous miner.

MR. INGRAM: It might be helpful if we could use one of these pictures.

A. Do you want to refer to the map?

Q. Sure. Anytime Mr. Ingram and I decide we should bring these up, referring to these various—what is the word for those?—pictures to help us describe things, if it helps you, really.

A. This is a typical longwall operation (indicating). It's operating after the pillars have been outlined and the whole system has been set up.

But basically all of this coal through here (indicating) has been mined by continuous miners, and all of this coal (indicating) in the gray at the bottom of the slide will be mined by longwall and has already been mined by longwall behind the face.

The direction of mining, of course, is down, and that's a plan view.

Q. Now, in that picture, referring to the areas around the panels, which is the pillar and which is the entryway, the green or the dark, please?

A. Well, the green is the entry and the pillar is dark, and that is not to scale.

Q. Okay. Well, what is the approximate scale?

A. Typically the entries would range between 13 and 18 feet in width. That's the tunnel.

The pillars would range between 40 and 85 feet in width.

Q. That is somewhere between three times and, what, six times as much pillar as entryway?

A. Well, if you express it in terms of extraction ratio in the development, you would typically be on the longwall development panel somewhere around 35 percent extraction on the advance.

Q. And all those pillars will be left in place, though?

A. That is correct.

Q. Now, you said a few minutes ago, before we had our short break, that with respect to recovery in the panels under full extraction room and pillar methods, that the ratios varied from about 70 to 90 percent of the coal.

A. That's correct.

Q. And what I would like you to tell me is what are the, first, factors that result in it being as low as 90 and what brings it down to 70?

A. I think it would be easiest for me to refer to another map here. Is that all right?

Q. Please do so. The goal today is to help me understand.

(Thereupon, Dahl Deposition Exhibits Nos. 1, 2 and 3 were marked for identification.)

A. In room and pillar mining, typically what happened is that you would advance a series of main entries and connecting crosscuts through an area.

You would stop at the end, and then you would start to extract the pillars on retreat. And the question is, why can't you get it all?

As you extract this pillar (indicating), let's say you start here (indicating) and you start extracting this pillar (indicating), you would come in and you would drive—it's not shown on the map here, but you would drive another tunnel right through here (indicating), and then you would start to punch through and mine the coal left in what is called a fender to the left on this map.

Of that first entry or split, as it's called in coal mining, as you pull these little pieces of coal out, instead of having a roof that spans 15 feet, you have a roof that spans 15 feet plus the entry you drove, plus the fender that you're trying to extract, something around 40 feet in width that is unsupported by any coal pillars.

And what happens is that the roof will begin to break up on you.

The degree to which you can stay in there and mine depends on how well that roof stands up on you. Many times—then, of course, after you finish that, you go around the other side of the pillar, you do the same thing with this left here (indicating), and you generally work the pillar down in what's called a wing and pocket method, as an example, and you will have this pillar removed. Maybe you get 85 percent of the coal in that pillar.

The reason you only get 85 percent, you just are increasing the span of the exposed roof, and the roof tends to start to come in on you.

Q. So the reason it dropped to 90 percent or 70 percent, or some other number, in between, or slightly to the side of those is how much coal you have to leave in place to support the roof; is that a fair statement?

A. Yes. It's not strictly accurate, but it's a fair statement.

The other thing that does happen is that once you start a gob line, you then start getting pressures that might ride over and affect the entries that are out of the mine with respect to where you are, and you may have to abandon entire pillars and start anew, many times.

You might have to abandon a whole row of pillars, or one or two pillars, because the access to those pillars has been ruined by pressures generated by mining the pillars behind it.

Q. Okay. Now, we alluded earlier, I think, to other situations that require you to leave coal in place. And a couple that I remember are barriers and boundaries and oil and gas lines.

A. Wells. Wells, not lines.

Q. Pardon me, yes. And I want to go to those in a minute.

But those types of problems are not calculated into the 70 to 90 percent figure you have just given me, are they?

A. That is correct, they are not included.

Q. What you have done is laid out panels that are not affected by those types of problems?

A. They may be affected, but you laid them out in such a fashion that you did not intend to mine them in the beginning.

Q. Okay. Let's go through those in a little more detail, make it clear what we are talking about.

When you used the concept of barrier coal left in place, what are you referring to?

A. To protect main access entries in the coal mine from areas that are fully extracted, neither by longwall or

continuous, you will typically leave a fairly large block of coal adjacent to the main entries, so that increased pressure due to the full extraction does not ride over or impact the area that you want to maintain for the long term.

It's a question of how long are you going to maintain the entries that you're in.

Q. Let me just hand across the table a document that has a definition of "barrier" that it purports to say is used by the Bureau of Mining Dictionary of Mining, Mineral and Related Terms.

Let me quote it, let you look at it, see if you think that's a reasonable definition. "Blocks of coal left between the workings of different mine owners and within those of a particular mine for safety and the reduction of operations costs. It helps to prevent disasters of inundation by water, of explosions, or fire involving an adjacent mine or another part of a mine and to prevent water running from one mine to another or from one section to another of the same mine."

Take a look at that and see if that's—

A. That's an incomplete definition.

Okay. The last—it says, "In addition, barrier used in this report refers to a relatively solid block of coal left to protect workings from squeezes in adjacent areas."

I would add that to the definition, then it would be fine.

Q. Okay. Fine.

A. Okay?

Q. Thanks.

And all of Consolidation Coal's mines would have coal left in place to form barriers, as described in the definition you have just given?

A. Correct.

Q. And that is true whether it is room and pillar, longwall, shortwall, or anything?

A. Correct.

Q. And with reference to the mines of Consolidation that you have knowledge of, is there some modification you can provide us of the amount of coal left in place for that purpose?

A. We could. I have not done so. I have not calculated it in that fashion.

Q. I think we did ask some questions that would go precisely to that. I'm just wondering if for today's purpose you can give us an order of magnitude.

A. I don't have that paper in front of me.

MR. REED: Off the record.

(Discussion off the record.)

A. There are circumstances in which barriers are removed, as you abandon a coal property. In the final days of the coal mine, you might begin to remove some of those barriers.

That's happened more in the past than it has recently, just due to the impact longwall efficiencies have had on the room and pillar coal. That is to say, we can't make any money by doing this anymore.

Q. Is the amount of coal left in place for purposes of a barrier related in any way to the type of mining method that is going to be employed?

A. Only to the extent that you would compare it to barriers left in place when you're doing partial mining exclusively.

In other words, if you were doing partial mining exclusively, the barriers left would not have to be as sub-

stantial as they are if you are doing either room and pillar mining or longwalling.

Q. But I understand that room and pillar, full room and pillar and longwall, there is no meaningful difference?

A. No.

Q. Now, I think the second area we talked about that you leave coal in place is what, for boundaries?

A. Yes.

Q. Okay. Tell us what you mean by that.

A. Well, as you mine up to a property boundary, either one that exists between you and another company or a mine boundary between your own mines, you leave a certain amount of coal in place to protect yourself from ventilation short circuits with respect to the mine next door, and from inundations of water from the mine next door, if that mine would be abandoned or not pumped up against the boundary.

Q. So that's something that is done for the safety and preservation of the mine, it is not a subsidence related matter?

A. No. Neither is the other barrier.

Q. Yes. I meant to ask that. I was going to go back. Thank you.

Is there any way you can quantify the amount of coal left in place for the purpose of boundaries, based on your knowledge of Consolidation Coal's mines?

A. Yes.

Q. Please do so.

A. Well, I can't do it off the top of my head.

Q. Okay. Is that a—

A. I would have to have a specific mine and a specific boundary.

Obviously the minimum amount of coal that would be left would be a circular mine.

If you have a rectangular one, that's one thing, and if you have several, you know, the more irregular the boundaries are, the more coal you leave in boundaries.

Q. I might say, it seems pretty certain to me, we are not going to finish today, and tomorrow we have Mathies Mine. Is that something that we could use to discuss these things in more detail?

A. Yes.

MR. INGRAM: Bob, I will interject, that you have specifically asked that question in your interrogatories, in terms of the amount of tons left in place.

MR. HOFFMAN: Okay.

MR. INGRAM: So you will have that information from the interrogatories.

MR. HOFFMAN: I'm just trying to get a general idea here. I appreciate that.

THE WITNESS: The amounts of coal left in barriers between mines is not that significant. It's a significant amount of tonnage in absolute terms, but it's not a—you're talking about one or two percent, or something like that.

MR. HOFFMAN: Of total coal in the—

THE WITNESS: —in place.

MR. HOFFMAN: Okay.

BY MR. HOFFMAN:

Q. Oil and gas lines was the next one.

A. Gas wells.

Q. Sorry.

And would you describe what we are talking about there.

A. In both terms of mining law and for the safety of the coal miners and the coal mine, you leave a barrier around active gas wells that penetrate the coal seam, to forestall the well bore from being displaced by the action of the gob, and then therefore, liberating gas into the coal mine and—

Q. And when we talk—

A. —and also interrupting somebody else's access to their property.

Q. So it is a problem both for operation of the coal mine and for the person who is relying on the oil or gas?

A. That's correct.

Q. And when you said the wells that penetrate the coal seam, if I understand it, we're talking about the wells themselves are below the coal seam, and there are shafts taking that oil or gas up to the surface that penetrate through the coal seam.

Is that accurate?

A. Well, I wouldn't call them shafts, because shafts usually refer to access for men and materials.

It's pipe, pipe that's underground.

Q. Is there a rule of thumb as to how much coal you have to leave in place to protect those pipes?

A. Yes. There is Pennsylvania law on it and there is—each state has their own set of regulations. Federal MSHA has some regulations as well.

I think it's, what, 300 feet in Pennsylvania? I don't know.

Q. Diameter of 300 feet around the pipe, does that seem right to you, sir?

A. I'm not certain.

Q. Okay.

A. I'm not certain.

Q. Neither am I.

A. But certainly I could go to one of the maps and measure it.

Q. I'm sure someone in this room knows it. It's a matter of law, it's what it is.

A. Yes, it's a matter of law.

Q. And again, that's something that's not dependent on the mining methods that are being employed, particularly with respect to room and pillar with full extraction—

A. That's correct, with the—

Q. Let me finish.

—versus longwall?

A. Yes. In terms of the regulations and law concerning what supports you leave around a well that you decide to leave in place, what you say is correct.

However, there is an enormous difference with respect to the practice of, one, mining through the gas well, or two, mining around the gas well, whenever you have a longwall operation as opposed to a room and pillar operation.

Q. Why don't you describe that for me?

A. One of the incentives to mine through, to plug a well and to mine through it, are compelling with respect to a longwall operation, and you many times will go out and purchase the well, or if it's an abandoned well, you will go in and plug it and you will mine through the well bore after plugging.

So that the practical side of it, yes, there is a big difference between the two, but in terms what the law says, if you are going to mine around it, yes, you have to do the same thing.

Q. Well, just to summarize what you said, I think I understand, assuming you don't own the well and you can't attain ownership of the well, you are going to protect them and leave the same amount of coal in place for longwall or room and pillar?

A. That is correct.

Q. But that if you are doing longwall, you have a greater economic incentive to purchase the well from the owner, and then to plug up the pipe, to prevent the problem of spillage and leakage and so forth.

A. Right.

Q. Okay. And have you actually done that, gone out and purchased—

A. Oh, yes, many times.

Q. Have you been able somehow to secure those property rights without paying exorbitant ransom?

A. Yes. There are cases where we have not been able to, also, and we have mined around them.

I mean, we have both cases. Can I bring that point up?

Q. You can bring up anything you want to.

A. With respect to oil and gas wells, when you know in advance that someone has a good one and you are unlikely to be able to buy it, you can lay out your operations such that the longwall, the well itself falls in one of these sets of development headings, and you don't have to plug it or mine through it or anything else.

It's possible to do that, where you know—

Q. When you said "development headings", do you mean the area of pillars and entries on the side of the panel?

A. Yes, yes.

Q. Okay. That is something I want to come to a little later, but let me just ask the question. I assume, within at least some limits, you can design your longwall operations so that the longwall panels do not fall underneath various surface structures and features.

A. Within some limits, that is correct.

Q. I understand the limitations, and we will talk about what those are, but okay.

Now, still going through a list of, I guess, what I call non-subsidence related reasons to leave coal in the ground, is another one to protect the coal mine against bodies of water?

A. Surface bodies of water?

Q. Yes.

A. Yes.

Q. And how do you do that?

A. It depends on the depth of cover. If the depth of cover is deep enough, you don't do anything, pretty much mine without the risk of incursions of surface bodies of water into the mine.

If you're shallow, you either avoid the area entirely or go to a partial mining circumstance, leave coal in the ground so that you don't break to the surface water.

Q. And again, in general terms, if you can, do you make any—where do you draw the line between deep and shallow, at least examples of the two?

A. There is a rule of thumb that is used around the world that has some safety factor in it that's a hundred to one, which is to say if you mine a hundred times the seam thickness away from a body of water, you will not break to the surface and cause a water flow to go underground.

It relates to the—if you remember earlier on in the deposition you asked me what we learned about longwalling, it relates to the 50 times the seam thickness, which you get cracking, and that hundred to one ratio has, in my mind, something like a safety factor of two.

Q. And the protection of bodies of water, as we have just described it, is again something that is done both in—and when it's necessary, it is something that is done in both room and pillar mining, as we have been describing it, and in longwall mining?

A. That's correct.

Q. Would leaving coal in place for what I guess I would describe as access ways be another thing that you have to do?

A. Underground access ways?

Q. Yes.

A. Well, that's the barrier pillars you are referring to.

Q. That's the barrier pillars, okay.

A. That you were referring to before.

Q. Okay. Now, separate and apart from—we discussed earlier that you leave coal in place in a room and pillar situation to protect the roofs. That was really the 70 to 90 percent figure we were talking about.

Do you have to leave coal in place to protect the roofs in other areas outside of the panels?

A. That's the reason the barrier pillars are put in place.

Q. Okay. So that's not a separate matter, we have covered that in the area of barrier pillars?

A. That's correct.

Q. Because I have different lists, and sometimes they don't match the way you're organizing your lists, and that's why.

Do you have to leave coal in place to preserve the floor of the mine?

A. Yes. I tend to categorize that in the same sense I do the roof.

In many cases, the floor is the weakest member and it gives before the roof does. So in that case, you are leaving barriers to protect the floor.

Q. And this may be my ignorance, but do pillars of coal protect the floor the same way—do the same pillars protect the floor as the roof, or something like that?

A. For a period of time, yes. The larger the pillar area, the lower the floor pressures are, the average floor pressures are, and the longer an area will stay without converging, either through the floor or the pillar moving.

Again, sometimes they will give, but the larger it is, the longer period of time you have before motion starts.

Q. I assume you are familiar with, I guess what has been described as a lenticular deposit of coal?

A. Oh, I've never heard it spoken of that way, but I think I know what you're talking about.

Q. Well, I'm just reading a report that describes it. It says, "Lenticular deposits of coal which vary in thickness."

So the coal seam is not of uniform thickness, is what it is describing there, I think; correct?

A. Yes.

Q. Does the presence of that result in leaving coal in place from time to time?

A. Well, yes, because when you set up the mine, a coal reserve, you will pick some thickness of coal. If it is lenticular, or if it does vary considerably in thickness, you will pick some thickness of coal that you are going to size your equipment for, and maybe that equipment will work well on down to 48 inches, and then all of a sudden your productivity drops off, and then at 44 inches you just cannot physically get the equipment in between the top and the bottom.

— So that if your deposit varies a good deal in thickness, then, yes, you leave more coal in place, just because you can't physically mine it.

Q. Is that something that occurs in the Pittsburgh seam that, I guess, you are primarily mining?

A. Not in Pennsylvania.

Q. In other places?

A. It occurs—the only place I really know of it occurring is in the western part of West Virginia, south of Wetzel County, and in Ohio, across the river in Ohio, across the river from the same place, south of Wetzel County in West Virginia. It's the only place I know of that it occurs.

Let me back up just a bit. There are rock fault areas, what are called rock fault areas in the Pittsburgh seam in which the coal abruptly changes its thickness due to washouts. I'm not including that in the lenticular—under the term "lenticular deposit", which you are using here.

Q. What do you mean by a washout?

A. Well, sometimes in geologic history, the deposit that was wood and peat and so on was eroded, either through streams or ocean action, beach action. It was eroded and displaced with typically sandstone and actually had a pool there, just cut, by erosion, you have sandstone.

Q. And as a result, the seam is—

A. —partially holding on.

Q. And that results in the same type of situation that you described a moment ago with respect to lenticular deposits, or can result in that?

A. Well, it's more rapid and occurs immediately and it's not as gradual a change in geology. It's abrupt, but you still will leave coal, in many instances, just due to the geometry of having to work around this kind of area.

Q. The seam gets too small to work in?

A. Or disappears.

Q. And that is something that does happen or is present in the Pittsburgh seam that you mine?

A. It's present, yes.

Q. And—

A. But I wouldn't refer to that as lenticular. I would characterize that as faults or washouts or something else. It's not really a lenticular reserve.

Q. Let me just emphasize again, don't let me, in my lack of knowledge or use of very general terms, get you into saying things in less precision than you want to. Okay?

But the impact of washouts on your mining is the same whether you are using room and pillar or a longwall?

A. Well, in a kind of a broad sense, perhaps, but I would say if a reserve is characterized by washouts, or an area of a reserve is characterized by washouts, it would prohibit you from using a longwall technique, or certainly would reduce the attractiveness to you, because you cannot move a longwall.

So you would look at a reserve differently from the beginning, if it was characterized by washouts, or if it was lenticular.

Q. So in either event, it would have a more severe impact on your longwall operations. Indeed, what you might well do is not longwall mine in that circumstance?

A. Yes, or not mine.

Q. Are there any other circumstances or reasons that come to your mind at the moment that we haven't yet explored for which you leave coal in the ground that are more or less irrespective of mining method and not related to subsidence protection?

A. Only economic.

Q. And if I can just summarize that in a couple of sentences, it is that coal can be too expensive to get out of the ground to make it worth your while?

A. That's correct.

Q. Is that dependent on mining method?

A. Yes.

Q. And how is that?

A. Well, it's far more expensive to mine coal with a continuous miner operation than it is with longwall.

And for that reason, we would, particularly towards the end of a mine's life, you might well leave quite a bit of coal in the ground, if continuous miners were the method of mining.

Q. Is it the case when you lay out a mine that there will be some coal by virtue of the geological formations, or whatever, that irrespective of mining methods, you will just say it's just going to be too expensive to get out of the ground, and it will be left for that reason?

A. No, I wouldn't make that generality. I wouldn't make that generality.

There may be, in certain mines, but we have mines that cover tens of thousands of acres for which I don't

know of a single geologic reason we could not continue a longwall operation through the entire thing as planned.

I would say that would be true of the continuous miner operation, though. There is some coal always going to be left there, due to physical constraints.

MR. FASSIO: And quality.

A. And quality, that's right, quality is another issue.

Q. I assume what you try to do when you lay out the mine is to try to design your panels so they don't overlie that area of the coal that is going to be hard to get is not where the panels are for a room and pillar operation?

Sorry, that question was not very well stated.

A. Well, you would lay out the mine so as to most efficiently extract the reserve. And if you have a thin area, you most likely would try to leave that until the end and not try to get it right off the bat, when you spend all your capital.

MR. HOFFMAN: What I want to do is get marked as whatever exhibit we have—

MR. INGRAM: No. 4.

(Thereupon, Dahl Deposition Exhibit No. 4 was marked for identification.)

(Discussion off the record.)

MR. HOFFMAN: Let me just make clear on the record, though, that Exhibits 1 through 3 are various charts that Mr. Ingram marked, and I appreciate that, but I'm not necessarily vouching for them or offering them at this stage.

So for purposes of the deposition, it is certainly helpful.

BY MR. HOFFMAN:

Q. I want to hand you what I have had marked as Deposition Exhibit 4, and it includes a table that just

lists about 20 different circumstances or items, and I will just read it, titled, "Unquantifiable Factors Identified by Mine Personnel as Adversely Affecting Recovery."

Some of those are ones we already talked about, bad roof conditions, oil and gas wells on mine property and so forth.

I'm just wondering if you can spend a minute, read that list through and indicate which of those are not, in your view, legitimate factors, based upon your experience?

A. Given a specific instance, all of these are valid reasons for leaving coal.

Q. Which is not to say that all of them occur in every mine, or even with any particular frequency; is that what you are saying, sir?

A. That is correct. That is correct.

Q. Okay. Now, there is, on the right hand column of what I have shown you, a column entitled "Frequency Mentioned", which indicates at least on this that certain problems are mentioned more often than others as factors identified by mine personnel as adversely affecting recovery.

I'm just wondering whether that order of magnitude appears accurate to you, based on your own experience?

A. I would view this order as totally meaningless.

Q. Why is that?

A. Well, it just—it has no bearing on the—I mean, this looks to me like a Bureau of Mines report, which somebody summarized a questionnaire. And they summarized this questionnaire with respect to a whole variety of different mining methods and different seams, and all that sort of thing.

For example, if you wanted to describe or put in the ground a coal seam that was ideal from the standpoint

of longwalling, the Pittsburgh seam would come pretty close. Okay?

And I don't—and the reasons for leaving coal in place in the Pittsburgh seam where you're longwalling would be totally different than they would be for room and pillar operations in the Freeport seam, which would be totally different than the Kittanning, which would be totally different than Sewickley. You can just go on and on.

To summarize a chart like this, across all kinds of coal seams and different kinds of hardware and different kinds of ownerships with respect to leases and fee ownership, and with respect to who owns the surface estate and all that sort of jazz is just meaningless, totally irrelevant.

Q. Okay. I didn't mean to mislead you in any way. It's a table from the report of the Bureau of Mines. It is entitled, "Coal Recovery From Underground Bituminous Coal Mines in the United States by Mining Method." And it's Table 10.

I did not want to burden the record with the entire report. That's all. It's just a list of factors that I presented for your consideration.

Now, let's go back to longwall for a minute, and particularly the layout.

We have longwall panels. First of all, what is the size or range of sizes of a longwall panel?

A. They range anywhere from 400—and in this country, let me restrict the answer to this country. In this country it would range anywhere from 400 to 750 feet in width, and anywhere from a couple thousand to 9,000 feet in length.

Typically Consol's longwall panels are 600 feet in width and range between 4 and 7,000 feet in length, with the average probably 6,000 feet.

Q. And again, I'm going to ask these questions in terms of either a normal Consolidation longwall panel mine or a specific mine that you have in mind, however you want to do it, but first—

A. Why is the geometry important, is that what you—

Q. No. I'm interested, then—next to the panel is the row of pillars. What do you call that area?

A. Development entry.

Q. And what is the dimension of that that would normally be between longwall panels?

A. Between 150 and 200 feet in width and that same length.

Q. And then would we expect, in a longwall mine that was laid out without any outside constraints, to see alternating panels, development and entry, panels, development and entry?

A. Yes.

Q. Approximately in those dimensions?

A. If you had N panels you would have N plus one development entries.

Q. Explain what that means, please.

A. Well, the first one, you have to have two on both sides. The second one after that, you have one after that, you just add one per panel.

Q. So on the front and back ends of the mine, you have double rows of development and entry?

A. Not the front and back ends.

Q. Sorry.

A. Each panel is surrounded by two, but if you have—it's just any—it's the same thing as any boundary between the succession of elements. You always have N plus one boundaries and N elements.

Q. Somehow I'm not following that. I apologize.

A. Right. The first panel, you have to have two sets, and it that's all you have, you have two development sets of headings and one panel.

Okay. When you make the second panel, you have three sets of development headings and two panels. When you make the third panel, you have four sets of development headings and four panels.

There is always, in the succession of panels, one more set of development headings than there are panels.

In addition to that, we have bleeder entries, submains and some other development headings that are in addition to what I'm talking about here, but there are always N plus one set of panels for N panels in a group of panels.

Q. And with respect to the entries, again, let me make sure I understand that. The entries are somewhere between 13 and 18 feet in width on the panels, and the pillars are somewhere between 40 and 85 feet in width. I think that's what I have from your previous testimony.

A. Yes.

Q. That's what you were talking about, an area that is 150 to 200 feet in width?

A. 250 feet.

Q. 250 feet. And in that area, approximately 35 percent of the coal is left—is mined?

A. Correct.

Q. I'm looking now at what we have marked as Deposition Exhibit 1 and Deposition Exhibit 2.

If I were to try to put those two together, would I understand that the area on Deposition Exhibit 2, which is in gray and green and is the entry and development area, would correspond to the orange sections?

A. That is correct.

Q. And then Deposition Exhibit 1 shows alternating pattern of longwall panel, development entry, longwall panel, development entry area?

A. Correct.

Q. And I'm not sure what this mine—what this Deposition Exhibit 1 shows, but let's assume for the moment that we had a mine that was just solely panel and development and entry and didn't have any of the problems we have talked about earlier, factors that would cause you to leave coal in place, boundaries, gas and oil lines and so forth.

What would be within the area that we are describing, just the panels and development and entry, the overall percentage of coal that is removed?

A. Exclusive of the mains?

Q. What do you mean by "mains"?

A. The mains are the north-south heading, orange ones on the right.

Q. Okay. Yes. Just within the area itself.

A. It would be in the range of 75 percent in the panel areas where you are counting coal left in development as unrecovered.

In other words, the issue being you don't intend to mine that coal with the longwall method. Therefore, it's not recovered, but if you include that as unrecovered coal in that area, 75 percent would be a good number.

Q. So what we are including in that 75 percent, or what brings that down to 75 percent, is the pillars that you leave in place in the entry and development area?

A. That is correct.

Q. Now, you mentioned the main and the submain, which appear on Deposition Exhibit No. 1. And first, if you would describe for me what their purpose is?

A. They are for providing access to—for men, materials, supplies, power and ventilation to the working areas of the mine.

Q. And they are something that are developed in the—well, I guess in the development stage of the mine, where you can really go out and work the mine?

A. That's the first thing that you develop, but they are being developed at pretty much all the phases of mining, until the last few years, when you start to—when you reach the boundaries of the mine and you are just finishing up.

Q. And would that section of the mine shown on Deposition Exhibit 1 as being submain and main be substantially similar, whether the rest of the mine was going to be longwall or room and pillar?

When I say "substantially the same", I don't mean in every technical detail, but in terms of its overall size and so forth.

A. You are correct, there would be differences, but substantially they are the same.

Q. I assume that you mean different equipment and different development in some ways, but I'm leaving those to the side.

A. Mostly it's air.

Q. Okay.

A. But go ahead.

Q. Now, on the typical longwall mining plan that is shown in Deposition Exhibit 1, the main and submain run the full width of the mine, and maybe they are

about a quarter to a sixth as wide, possibly, as the mine is long?

I'm just trying to get a sense if that's reasonably in scale or not.

A. That is to scale. That map you see is to scale.

However, what is not included is all of the longwall panels and submains for the mine property.

Q. You will have to explain that.

A. It's only a portion of the mine. It's only a small portion of the mine.

Q. Well, I guess what I'm trying to understand is how do I compare this size—strike that.

What kind of mining is done in the main and submain? What is left in place?

A. Pillars just as they are for the longwall development headings.

Q. And the dimensions you gave us previously and the percentage of coal that is left in place would be about the same?

A. The 250 foot would not be the same. The percentage extraction would be somewhat higher than it is in longwall development heading, and the width, that shown is three sets of development headings for a series of mains and submains.

You might only have one, you might have two and you might vary between a thousand and, oh, 1,500 feet, 2,000 feet in width.

That whole series of mains and submains and those designs vary all over the place, depending upon the length of time that you need to have that series of panels in service, the amount of gas that you expect to insur in the mine and the amount of ventilating air you have to course through the mine to dilute it.

So the size of those things varies quite a bit, depending on the physical circumstances of the property you are mining, and the length of time for which you must maintain the set of headings.

Q. Okay. Now, I want to try to go back to room and pillar for a minute on the percent of recovery.

First of all, if you're doing room and pillar as reflected on Deposition Exhibit 3, am I right that you don't have—that by the time you have retreated and pulled pillars, you don't have anything that resembles the development and entry section in a longwall mining plan?

A. You might have one row of pillars rather than two or three, or you may have none.

Generally speaking, you're correct, there is no real operating necessity to leave rows of pillars in place, as there is with longwalling.

I said "operating necessity." Really it's a regulatory necessity imposed by MSHA and the state.

Q. Let's focus on Deposition Exhibit 1. And again let's assume, as we described earlier, that we had a mine which didn't have any constraints to it, it didn't have oil and gas or lakes that had to be supported and so forth.

If this were laid out as room and pillar, you would just have a series of rooms and pillars, rather than a panel with an entry; is that correct?

A. In a broad sense, the mine plan wouldn't look a whole lot different, really. You would have a set of mains, you would have a set of panel development headings, panel headings, and you would pull the panel levels by the panel development headings as you retreated.

So in a broad sense, the mine plan might look somewhat similar.

Q. Except that when you retreated, instead of leaving the pillars in place, that you would, like for the longwall, you would pull some percentage of pillars?

A. Correct.

Q. Now, you earlier gave me the figures, I believe, in room and pillar, within the panel you remove 85 percent of the coal that you intend to remove.

Do you remember that? Does that sound right to you?

A. Yes, that's what I said.

Q. And I don't understand what the intent to be removed means in the context of room and pillar, although I think I understand it in longwall.

A. Well, you may, for example, for ground control reasons, and due to the timing sequence in which you remove these pillars, you might leave, and it's fairly common to leave a single row of pillars in place, much as you left, say, two rows of pillars in place for longwalling, and I did not include that lost in my extraction ratio for the room and pillar mining.

Q. Okay. If you were going to add that in, where would we take the 85 percent to?

A. Oh, you might be down close to longwalling. I would say, generally speaking, though, if you asked me—I think I see the point you're getting to. If you asked me in terms—

Q. I'm not sure I do, but—

A. If you're asking me which method is going to remove more coal from panel areas, is it room and pillar with pillar removal or longwalling, that's a tough one.

Q. It sounds to me from your answer that they are close.

A. They are close. Theoretically, you can get more with room and pillar mining. That's theoretically, but as a practical matter, it's probably less, as a practical matter.

Q. Within what kind of difference? I mean—

A. I don't know. Ten percent either way, I'd say.

Q. So the answer would be while it certainly depends on the mine and how many pillars you leave back in place, they are going to be pretty close?

A. Yes.

Q. In terms of within what we call the panel areas, what you can get out—

A. Yes.

Q. —close?

A. Close, and it depends on the seam and gas and all kinds of things. It can vary over quite a wide margin, depending on physical conditions.

Q. And when you said that, and we're talking about the panel areas, what we're doing is we're taking Deposition Exhibit 1 and just excluding the areas of submain and main; right?

A. Yes.

Q. Okay.

A. That is a result, however, of United States regulatory environment surrounding how we operate our longwalls. That is not true of the rest of the world.

Q. But not unique to Pennsylvania?

A. Not unique to Pennsylvania, correct.

Q. Within the United States?

A. Right.

Q. I want to turn your attention now to the Bailey Mine.

So the record is clear on what I assume we all know, that is a mine that Consolidation Coal is planning or in the development stages that will be a mixed longwall and room and pillar operation?

A. No.

Q. Okay. You describe it.

A. We are planning and constructing it, and we are mining a little bit of coal at the shaft bottom now, but it will be a longwall and continuous miner operation. There will be no room and pillar activity at all. There will be just development for the walls and longwalling.

Q. You just confused me when you said continuous miner, which I always understood to be room and pillar.

A. No. Remember, room and pillar refers to a mining method in which the rooms are driven and the pillars are removed.

We will not remove pillars with the miners.

Q. Got you. Okay. I understand. Sorry.

A. Continuous miner is a machine, and room and pillar describes a mining operation.

All mining methods are characterized not by the equipment, but by the method of controlling the roof. Okay? And room and pillar is one technique, rooming is another, longwalling is another. Okay?

Q. Okay. What is the present status of that mine, in terms of planning, development or mining?

A. Well, we're building essentially a railroad on the site, 15-mile railroad is complete, essentially complete.

Q. It is a new mine for Consolidation?

A. New mine. Shaft and slopes are down to the coal. We're beginning operations around the bottom. The preparation plant is half complete.

Q. Is it accurate that that is the major new mine that Consolidation is planning in Pennsylvania in, say, even the next decade?

A. Oh, I would say no. We would intend to have and have in our long range plan the first three of the five mines there within the next decade, and it may well be more.

The second mine, for example, the shafts are being sunk for the second mine.

Q. So when we are talking about Bailey, we should be talking about Bailey 1 at the moment; is that right? Bailey 2 and 3 are somewhere in the offing?

A. Bailey 2 and 3, the shafts are already under construction, and we intend that that's a very major project, maybe one of the bigger ones in the world, in terms of coal mining.

Q. The whole Bailey set of mines?

A. That's correct.

Q. Can you describe for us where that is located and what the area is like?

A. It's Greene and Washington Counties in Southwestern Pennsylvania. The countryside is rolling. It does not have high relief. It's kind of a rolling countryside.

The center of it would be some 12 miles northwest of the Town of Waynesburg. There are some 280 million tons of clean recoverable coal in the field that Consol controls. It's Pittsburgh No. 8 seam coal.

Q. Why don't you describe what that means?

A. Well, it's the coal that's been mined in the Pittsburgh area for some hundred years or so. It's probably the largest continuous coal reserve in the world, but it's a very high heating value, high quality thermal coal.

Q. How thick is the seam?

A. The main seam ranges between 66 and 72 inches. There is a drawrock overlying that, and then there is a stringer seam of coal above that maybe a foot thick.

Q. And would you expect to mine both seams?

A. The longwall would mine only the main seam. The continuous miner would mine the main seam, drawrock and just barely skim the roof coal.

Q. What is the extent of the development of structures overlying the surface? And let's talk for a moment over Bailey, what I'll call Bailey 1.

A. Bailey 1 Mine has placed on the surface enough in terms of refuse structures, water, so forth, to handle the first three coal mines in the Bailey complex.

Those structures are getting pretty far along to completion. I'd hate to give a percentage.

Q. I said "structures." I think you were answering as if I asked you with respect to the structures that you were going to construct as with regard to your mining operation.

Is that how you understood my question?

A. Yes.

Q. What I meant is the private structures that exist, and I think we have a copy of the map here, if that would help.

A. Well, it just so happens that that Exhibit 1 happens to be a partial area of the mine with some of the structures on it.

Q. Okay. Mr. Alexander has brought some maps that are copies of what Consolidation submitted to him. If you would like access to those, we have them. If you would just like to use Deposition Exhibit 1, use that.

Just give we a sense of what kind of structures we have overlying the mine.

(Discussion off the record.)

BY MR. HOFFMAN:

Q. Now, with Mr. Alexander's assistance, we have placed before you a series of maps which I will represent to you are recent submission, actually permit application, that Consolidation Coal made to the Department of Environmental Resources for the Bailey Mine. And there is a particular map in here that I think identifies structures.

And when I say "structures", I am talking about two categories, structures as set forth in Section 4 of the state law, and additional groupings of structures set forth in Regulation 89.145.

A. I don't know what 89.145 is.

Q. That includes—Section 4 structures—

A. That's Section 4 structures?

MR. HOFFMAN: Off the record.

(Discussion off the record.)

BY MR. HOFFMAN:

Q. Let me come around by you, if I may, sir, so we are all looking at this in the same direction.

We have placed in front of you—let me back up for a second. You are aware that a permit has been granted to Consolidation to mine the Bailey Mine?

A. With one exception.

Q. Okay. And what is that exception?

A. Refuse area.

Q. Okay. And your application, as you said, was for a longwall mining operation?

A. Right.

Q. And the permit that was approved grants approval, subject to the limitation of refuse areas, I gather, to do the longwall operation; correct?

A. Yes.

Q. And that is, to my understanding, a permit that describes where you're heading for the next five years in that mine; correct?

A. I have not seen it, so you are asking me something I haven't read, but I assume it covers a five-year mining plan, and I also assume there are certain conditions on what we can do in those five years, and I'm not—I am not conversant in what those are.

Q. All right. In the notice of deposition we had asked for someone who was to be designated to talk about the planned mining activities under longwall for Consolidation.

I guess I had assumed that you would be a little more familiar with the Bailey Mine than you may be.

A. With respect to the permit, I am not.

MR. INGRAM: Off the record.

(Discussion off the record.)

MR. HOFFMAN: Okay. So let's go after this a little different way.

BY MR. HOFFMAN:

Q. I have placed in front of you part of the submission from Consolidation Coal to the Department that describes its five-year plan for development of the Bailey Mine.

You are familiar with the planned development of the Bailey Mine, sir?

A. Yes.

Q. Okay. The particular chart we have in front of us shows planned mining for the years 1983 through 1987, does it not?

A. Yes.

Q. And that is an accurate depiction of what the company plans with respect to mining at the Bailey Mine during that time period?

A. That's correct.

Q. And I have a little trouble distinguishing between some of the colors on this map, but—

A. Years, the colors are years.

Q. I understand that. But what it shows, really, is—I don't know how you want to describe this, as one contiguous longwall panel and portions of two longwall panels will be developed during that period?

A. That is correct.

Q. And then it also—

A. No. Longwall panel will be mined during that time frame, not developed.

Q. Sorry. That's what I meant to say.

And during that time period, there will be developed other longwall panels for mining during a period subsequent to 1987?

A. Correct.

Q. The Department has given Consolidation approval to mine the longwall panels reflected on this map during the period 1983 through 1987?

A. Right.

Q. Now, is it likely that your—strike that.

From the map, it appears to me that you have areas that seem to reflect panels for the future, together with development entries and headings.

A. Right.

Q. And the way they reflect on this map is that the panels are about an inch and a half in width and the development areas are about a half an inch or a little less in width; right?

A. Yes.

Q. So can we assume that subsequent to 1987—well, during the next five-year period, we will just see more of the planned panels mined that are shown on this map?

A. Subject to certain matters regarding subsidence, that is correct.

What I'm saying is there is uncertainty regarding the post '87.

Q. Okay. And—

A. And actually—well, go ahead.

Q. Well, so the uncertainties you face with respect to the development of the Bailey Mine are post 1987?

A. I believe that to be generally correct, although—can I go off the record for a minute?

Q. Well, what you can really do is just correct it at any time you feel a need to. We all want accurate information in the long run.

(Discussion off the record.)

BY MR. HOFFMAN:

Q. Mr. Dahl, in the off the record discussion, expressed the possibility that there might be some question as to the impoundment of the water that may affect the post 1987 development plans, or possibly some portion of their

pre-1987 development plans. And I guess I'm wondering whether between now and tomorrow you could clarify that and we can pick it up?

A. Yes. I'll look into it, but I think it would affect pre-'87 plans, yes.

Q. I will ask you to give a more definite statement on that at a future date. Okay?

My understanding, and again, correct me if I'm wrong, that with respect to the area that is being mined, or expected to be mined during the period from the present through 1987, that Consolidation owns all the surface land as well as the coal rights?

A. I believe that's correct.

Q. Now, let's go back, if we can, to the chart that shows various surface structures.

Now, if we were—first of all, if we were to superimpose this map onto the map we were just looking at, all of the development would be through 1987, at least, would be in the top third of the area that is shown as the mine?

A. I haven't done it, but it looks like it would be, yes.

Q. Compare that, you see Owens Run here (indicating)?

A. I see the property lines drawn here (indicating). Okay.

Q. I don't think it's worth going through this in every structure, so let's just kind of get a sense of it.

The legend shows that an item marked in blue is a cemetery in place in 1966.

There is one of those within the area that is ultimately within the mine plan, although not within the next five years; right?

A. Correct.

Q. Now, protected buildings are reflected—excuse me—public buildings are reflected on this mine as open squares.

Does anybody see any on the mine?

A. I see one right there (indicating). I don't know what that is, though.

There is one over here (indicating). There is one over here (indicating).

Q. There is a whole series down around Owens Run, aren't there?

A. Yes.

MR HOFFMAN: Off the record.

(Discussion off the record.)

BY MR. HOFFMAN:

Q. Protected structures are reflected by the code yellow. And without meaning to count them all up, there must be somewhere in the nature of 10 to 20 on the map.

A. Yes.

Q. And they are all in the quadrant of the mine that is post 1987 development?

A. With the exception of perhaps this one (indicating).

Let's just take a look at that one. It's along the road headed north there.

Now, that would have a—that's within the—that protected structure is within the '97 time frame.

Q. Within which time frame?

A. Well, it's blue, which would be mining within '86, but wouldn't be subsiding in '86, but it would be mining development heading in '86.

Q. Indeed it appears to be within a panel which is planned for post 1987 development somewhere.

A. Post 1987 extraction.

Q. Mining, pardon me.

A. Correct.

Q. And would you be able to tell us today what the plan for 1988 through 1993 would be likely to look like?

A. 1993, you mean?

Q. Yes, the next five-year plan after this one.

A. Well, I think it depends on developments that are yet incomplete.

Q. If you have no constraints upon you, or none of the constraints that are the subject of this lawsuit upon you—

A. It would be a uniform continuation of what you see before you.

Q. Would we be progressing, since there is a panel that is half—about one third filled in, would we expect to see that filled in over the next five-year period, that is the next order of development?

A. Yes.

Q. The next order of mining, pardon me.

A. Correct. The development and mining would extend generally to the south, as it is shown to begin here (indicating).

Q. And would it likely continue also to the western quadrant, as opposed to the eastern quadrant?

A. It would be in both.

Q. So for instance, we might expect, during the next five-year period for the second panel on the western side and the second panel from the north to be an area of extraction?

A. In round numbers, you would expect to mine each of these panels in a year. Okay?

In other words, you would just move south one panel per year. So this would be something like '88, '89, '90, '91, '92, '93, and the same over here (indicating). Okay?

Q. And you have two mining operations going on; is that correct?

A. Well, there would be one mining operation, two longwalls.

Q. That's what I meant.

A. And the development for them.

Q. Okay. Now, we have a different page of this map which shows various oil and gas wells in different categories from dry hole, active gas, abandoned gas, abandoned oil, active oil, abandoned combination oil/gas.

Now, these are the type of oil and gas lines that we described earlier would have to be protected by leaving a column in place; is that correct?

MR. REED: Wells.

Q. Wells.

A. If we had not or did not acquire the gas well, and if it's active, we would, then, as opposed to either locating them in the development hearings, if we didn't do that, we would then have to mine around them, that's correct.

Q. Is it your understanding that you either own or owned previously or have acquired in connection with this development all of the active oil or gas wells?

A. We have acquired everything within the five-year mining plan, to my knowledge. Okay?

Q. And do you know when that acquisition took place?

A. We just did some of it here a couple of months ago. I don't know. I can't answer the question for all of it.

We don't acquire it all right up front. You acquire it in an orderly fashion as you mine.

Q. Okay.

A. But we have acquired a good number of them. I know we just got four here a couple months ago. I don't know which four they are, except that they are in this five-year mining plan.

Q. Okay. Going back to the page of the mine that showed the five-year plan, and there are some areas sketched out—actually, I just want you to show me where the mains and the submains are in this.

A. Most likely—well, not most likely. This is a submain (indicating), this is a main (indicating), this is a submain (indicating).

Q. Okay. So we are referring to three panels running north and south, outlined respectively in blue or in brown, primarily, between the panels which run east and west?

A. Yes.

MR. HOFFMAN: Well, I'm at a good breaking spot, 1:30, so why don't we just break? Okay?

And I say thank you. We will bring you back for a little while tomorrow. I don't know how much.

(Thereupon, at 1:31 o'clock p.m. the deposition was adjourned to be continued on Thursday, October 10, 1983.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Plaintiffs,

vs.

NICHOLAS DEBENEDICTIS, *et al.*,
Defendants.

Continued Deposition of HILBERT DOUGLAS DAHL

Thursday, November 10, 1983

VOLUME II

The deposition of HILBERT DOUGLAS DAHL, called by the defendants for examination, pursuant to notice and the Federal Rules of Civil Procedure pertaining to the taking of depositions, taken before me, the undersigned, Sheryl L. Akerley, a Notary Public in and for the Commonwealth of Pennsylvania, at the law offices of Rose, Schmidt, Dixon & Hasley, Tenth Floor, Oliver Building, Pittsburgh, 15222, resuming at 1:09 o'clock p.m., the day and date above set forth.

APPEARANCES:

On Behalf of the Plaintiff Keystone Bituminous Coal Association:

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On Behalf of the Plaintiff Rochester & Pittsburgh Coal Company:

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On Behalf of the Plaintiff Consolidation Coal Company:

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On Behalf of the Plaintiffs U.S. Steel Mining Co., Inc., and United States Steel Corporation:

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United States Steel Corporation
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On Behalf of the Defendants:

Robert B. Hoffman, Esquire
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ALSO PRESENT:

Thomas B. Alexander

MR. HOFFMAN: The witness is still sworn from yesterday.

HILBERT DOUGLAS DAHL

called as a witness by the defendants, having been previously duly sworn, was examined and testified further as follows:

EXAMINATION CONTINUED

BY MR. HOFFMAN:

Q. Thank you for returning, and we are just going to try to tie up some loose ends and finish off the deposition that we started yesterday.

When we left yesterday, one of the items I think you were going to try to check, Mr. Dahl, was whether there was some issue regarding the Bailey Mine Permit that has recently been granted to Consolidation by the DER regarding an impoundment within the area that you expect to be mining during the next five years.

Do you have that information?

A. Yes. I don't remember, though, what question you made that prompted the issue.

Q. Well, you and I were discussing whether there were going to be any problems with respect to the subsidence—the application of the subsidence regulations to the Bailey Mine during the next five-year period, and I think where we concluded was that there wouldn't be, with the possible exception of an issue you thought might exist with respect to an impoundment, and you were going to go back and check.

That's how I recollect it.

A. Okay. Fine.

Q. Were you able to ascertain what the status is?

A. Yes. However, with respect to the question, you know, we had also—I had not read the terms and conditions under which the permit was granted, also, so I reserved the right to take a look at that, in terms of what problems there might be.

Q. Sure.

A. The issue of the impoundment, the DER has not been advised of the impoundment, simply because it was not in place at the time the permit was issued, but there will be an impoundment, a slurry impoundment that is underneath the first three panels of the longwall operation of Bailey. It's the first three panels on the east side.

And under the terms of the permit, and under the conditions of the permit, the DER will be advised of the impoundment and we will make application to longwall mine under the water contained in the impoundment, if not the dam.

So to the extent that there is a problem with respect to that impoundment in the first three panels on the east side, yes, we have problems with subsidence issues with respect to the Bailey Mine.

Secondly, the permit—the terms and conditions of the permit include things like 50 percent mining underneath any structure or surface feature, and exclude only those structures which we own; again, restricted to the first five years, did not exclude surface features which, under your definitions and as I understand it, include perennial streams. So that could be a problem.

The third thing is that this is a multimillion dollar project. It's in the hundreds of millions of dollars, and the first five years, while we're mining under our own surface for the first five years only, by no means will five years begin to pay off this investment.

We've got the next 20 years to worry about in order to pay this investment off, and there are a large number of structures and features that we do not own, in the next 20 years.

Q. Okay. I understand that.

So within the first five-year planning, there is an impoundment that you have not brought to the DER's attention, but that you expect to?

A. We will.

Q. And do you have any sense of when you will be bringing that to their attention?

A. I can't answer that definitively. I would expect it would be certainly within the next year, but—

Q. And that will be in what—do you know in what form you will be bringing that to their attention?

A. I would imagine—I don't know whether I'm wholly accurate on this. I imagine, first of all, our people would go sit with Mr. Alexander.

Secondly, as a matter of due course, as we submit our six-month mining plans, they will appear as a matter to be considered under the six-month plans.

Q. Okay.

A. Thirdly, I'd say that another problem area is this 10-day requirement that any change in mining plans, that we've got to tell you ten days prior to the time that we change direction of mining, and that's not specified. What do you mean?

Do you mean if we take a split in the pillar, or if you run a bleeder a certain way, or whatever? That's not specified, and I'm sure DER may not be unreasonable there, but still, the issue is, if we have to tell you six months in advance whether we mine under any structure, what good is the ten-day? That's just an onerous

reporting requirement that doesn't really mean anything, as far as I'm concerned.

Q. Okay. And what you're referring to in the last item—let's get this marked. It's a copy.

Let me just show you what we are going to have marked as Dahl Deposition 5, and ask you if that's a copy of the permit approval and conditions that we have just been discussing?

A. Yes, sir, it is.

(Thereupon, Dahl Deposition Exhibit No. 5 was marked for identification.)

Q. And the 10-day notice issue you were describing is the one that is set forth on the bottom of the first page there, is it not, sir?

A. There is one there. I'm not certain if that's the only reference to ten days.

Yes, there is a second reference to ten days, page 2, Section 4.

There is also a 24 hour requirement under support area requirement that's not relevant to what I said, though.

Q. Okay. Sir, if I can just try to generalize a little bit, or summarize, is it a fair statement that your primary concern or objection with respect to the DER's requirements of 50 percent mining under a class of structures and surface features that is now required, is that it interferes with your ability to do longwall mining?

A. I don't know if I like the word "primary", but, you know, I'm speaking as an operator and not a lawyer.

My primary concern, insofar as operating coal mines, is that it interferes, and I would say more than that, can be tantamount to eliminating longwall as a consideration.

Q. I guess my question was, though, is that the major problem you have with the support requirements, or a major problem that we have with the support requirements, or a major problem that we have with the support requirements?

How would you characterize it, sir?

A. Yes, it's a major problem.

Q. Is there any problem that the support requirements impose upon the operations of Consolidation Coal that is more serious from your view?

A. I wouldn't characterize any as more serious, no.

Q. Okay. What would be the one that would be as serious or second to that, if you could?

A. I take a strong view towards the property rights issue by themselves. We obtained and paid for the right to damage the surface estate, and the taking of my rights without regard to whether or not it impacts longwalls more than continuous miners, so on and so forth.

Q. Now, Mr. Dahl, I want to turn your attention back to Deposition Exhibit 1, which is the—

A. May I add—

Q. Surely.

A. May I add another comment to your last—

Q. At anytime during this deposition, if you want to add a statement, do it.

A. I didn't fully—the new Section 15 provisions, in addition to previously, you know, we had a situation in which if somebody bought the surface, or, I'm sorry, bought the coal, not the surface, but if they bought the coal underneath the property for support, I think I'm correct in saying, we were then not liable for damage.

Now, I think the situation has changed in our new interpretation of 15. We're still liable for damage.

Q. Okay.

A. I would want to check that. I think it's the case, but go ahead.

Q. Really what I was asking you about was the 50 percent situation.

A. Okay.

Q. All right. I want to turn our attention to Deposition Exhibit 1, which is a chart that shows a typical longwall mining plan.

You indicated just a minute ago that the presence of protected structures and the 50 percent mining rule with respect to them can make longwall mining impossible. And I just want to ask you whether it isn't possible that you can have protected structures and 50 percent mining and longwall if the location and frequency of the structures allows you to place them—allows you to design your mains, submains or entryways underneath those structures?

A. It is theoretically possible, but even in some of the most remote areas that we operate in and have plans to operate in, such as the Bailey Mine, my interpretation of what the '81 amendments do to a place like Bailey is it would just rule out longwall mining from an economic viewpoint. We could not afford longwall.

MR. HOFFMAN: Can you read back his answer?

(Record read.)

Q. And when you said the '81 amendments, are you referring to regulations which may or may not have been promulgated in 1981, but extend the class of structures and features under which the 50 percent rule would be applicable?

A. Yes, those and the ones contained in the '66 Act.

Q. Right. Did the extension of structures to homes, irrespective of their date of construction, public buildings, irrespective of their date of construction, to certain types of impoundments and aquifers, which I think is a fair statement of the '81, '82 extensions, does that cause you particular problems?

A. And perennial streams.

Q. Yes.

A. Yes.

Q. To what extent do those extensions magnify or increase the difficulties you have?

A. If you would look on that Deposition Exhibit 1, not all of the perennial streams are blocked in in yellow. Some of them are in blue and not blocked in with yellow.

Include the yellow areas under pipelines, buildings, major roads and highways and some of the streams which are on, and then extend that. In addition, add those areas underneath all of the blue, you'd see that we would be making longwall moves on an average of perhaps three or four times a panel and leaving perhaps 50 percent of the longwall coal in place, and our economic studies would show that we cannot afford to do that.

Q. So for example, if I understood what you just said, perennial streams, extension to perennial streams is a matter of particular concern to you?

A. It's a concern, just as much as the structures and as much as everything else.

Q. Well, the question I asked, that I thought you answered in the context of perennial streams, was to what extent did the extension in 1981 and '82 by regulations

to homes and public buildings—excuse me—to public buildings irrespective of dates, to aquifer impoundments and perennial streams magnify your problem?

A. Well, I would have to look at each specific instance in order to answer that question definitively. I've read some of the language with respect to acquifers, and frankly, it scares me.

I could interpret that as a prohibition, if I so desired to interpret it, so it runs all the way from prohibition to some number that I'm not really prepared to answer without having a specific instance.

Q. Okay. Am I correct that the location of a 50 percent formula is more compatible with a room and pillar operation than it is with longwall?

A. It has less of an economic impact.

Q. And that is because you're already leaving pillars, and what the 50 percent requirement makes you do is just leave larger pillars, in essence?

A. And more. But the key is with room and pillar operations and you have flexibility to move.

Q. The equipment, you're talking about?

A. You have flexibility to move the equipment, and you have flexibility of the geometry of the mine. You do not have that with longwall.

Q. I wanted to ask you about that. Ideally, I understand, that what you would like to do is have the equipment, the longwall machine start at one end of the panel and continue unimpeded continuously through to the other end of the panel; is that right?

A. That is correct.

Q. Now, is it possible to break down the longwall mining equipment, for example, in the midst of a panel,

to take it out an entry and then reassemble it, oh, a hundred yards down the panel and begin it again?

A. Yes.

Q. I assume that there is a cost associated with doing that?

A. An enormous cost.

Q. Is that a lack of productivity cost, that time is lost, in essence?

A. Well, there is a lot of dollars involved in the manpower to do it. No. 1, a lot of supply costs are involved in supporting the operation, but most importantly what happens is that you lose, each time you move the longwall, you lose perhaps 5,000 tons a day of production for the number of days that it takes you to move the longwall.

Now, we have moved longwalls in as little as 10 days and as long as 45; 20 might be an average for the industry. It used to be an average for Consol, but that's 100,000 tons of lost production.

100,000 tons of coal is a lot of money.

Q. So it's really a downtime problem?

A. And a reserve loss. You lose a considerable amount of reserves.

As I said, we may be talking about only 40 percent of the coal being removed that we had planned in this operation, so it's reserves and operating costs.

Q. I'm just trying to understand that. Okay.

In that situation we just talked about in which you can, conceivably, though I understand the problems involved, move the longwall mining equipment down the panel, out and down the panel, you can then go back with continuous mining equipment and develop a room

and pillar, whether under 50 percent mining or otherwise, under the area that is left behind; is that correct?

A. You could, but you could not afford to do it.

No, let me back up. Technically, it's not feasible. Once you move this panel, let's say you leave a block of coal here (indicating) and you start up again, this is surrounded by gob, this panel is being developed for the second longwall panel, there is no access available to that reserve. The reserve is sterilized. The reserve is completely sterilized.

Q. Okay.

A. In other words, if you were to try and protect structures with 50 percent mining by moving longwalls, and running continuous miners in there to recover that coal, technically, No. 1, you could not do it.

No. 2, if you could do it technically, you could not afford to do it.

Q. One of the things you talked about very briefly yesterday, and you started to talk about it in your opening discussion this afternoon, was the extensive amount of planning involved in the development of a mine, or preceding the development of a mine.

I want to take as an example, if we can, the Bailey Mine, which you are just getting underway, and, if you can tell me, when active planning for the development of that mine would have begun?

A. Can I break for a second?

Q. Sure.

(Discussion off the record.)

A. We began mine planning in May of 1980.

Q. And was it at that time, or somewhat thereafter, that you made a decision that you would like to supply a longwall mining method to that mine?

A. We made the decision that we could not afford to acquire the property nor operate it without longwall mining.

Q. So it preceded May of 1980, that decision?

A. Well, we begin mine planning in May of 1980.

Prior to the end of the year, and during that year, and I can't tell you exactly when that decision was made, but I would say early on after May, June, July, somewhere in there, we knew that we could not afford to acquire the property and develop the mine without longwall mining.

Q. Did you acquire that property from United States Steel or United States Steel Mining Corp.?

A. Parts of it.

Q. And is that the acquisition of property that you are talking about in 1980 that relates to the Bailey Mine, or did you acquire other portions—

A. Final acquisition, I think, occurred in January of '81, but we were in negotiation throughout the year and in mine planning activities relative to it.

Q. Did you acquire all of the Bailey Mine that we are talking about, I guess as I described as Bailey 1, during 1980 or '81 or that period?

A. We had contiguous reserves to that, which we called our Nineveh property. I do not know right off the top of my head how much of the No. 1 reserves were actually in the U.S. Steel portion that was acquired or how much of it was in that Nineveh.

Most of it, I'm certain, was in the U.S. Steel acquisition.

Q. Have you at this stage purchased longwall mining machines specifically for use in the Bailey Mine?

A. No, we have not.

Q. Do you anticipate doing so at some point?

A. We're in discussions with various vendors at the time.

Q. Am I accurate in asking the question which really assumed that a longwall mining machine is dedicated to a particular mine; that is, it is used in that mine exclusively, bought for that purpose?

A. Yes. Normally you size the requirement for specific seam thickness and so forth, and it's—while you can move equipment from mine to mine, typically it's impractical to do so because of changes in conditions.

Floor conditions, you buy the equipment for how hard and soft the floor is and how thick the coal is and whether or not you are mining underneath the draw-rock and so on and so forth.

So they are not typically transferred between mines, although in certain cases it's certainly possible.

Q. Is the development of the basic mine planned out at this stage, at least in general terms, through the life of that mine, expected lifetime of that mine?

A: We have projections for the life of the mine, yes.

Q. What do you expect the life of the mine to be, by the way?

A. 33 years, plus or minus.

Q. And you have sketched out that entire mine as a series of longwall panels with entry and development areas between them, as we described yesterday?

A. Yes.

Q. Now, you said yesterday, I believe, that once you have laid out a mine in a longwall pattern, that there is, I guess, less flexibility to modify it than if you set it up as a room and pillar.

Is that a reasonably fair statement of what you said yesterday?

A. Yes.

Q. Why is that the case?

A. With a longwall operation, you set up the first panel in a specific direction, and once you drive the entries, they are driven, you can't change them and they are driven.

Normally you drive this panel with respect to the access entry and the boundary of the mine, leaving, you know, a logical sequence to follow towards other boundaries of the mine.

While it would be possible to change the direction of the panels subsequent to the first set of panels, it would be extremely costly in terms of timing and development costs to do so.

Comparing that to room and pillar mining; you can operate a room and pillar section in pretty much any direction you so desire. You can make frequent turns of belt conveyors and rail haulage systems and so forth that you cannot do with longwalling, simply because of the geometry extraction.

Q. Now, that is not to say, is it, that if you design a mine as a longwall, that you must forever mine it as a longwall?

A. No. I'm not saying that at all.

Q. You could, for example, mine what is marked as panel 1 on Deposition Exhibit 1 as a longwall, and then if something happened, you could mine panel 2 and 3 and so forth as room and pillar, from an operating standpoint; correct?

A. Can I say, from an operating standpoint, you're correct. Of course, today you could not afford to do so.

Q. So when we talked about there was less flexibility in the design of the longwall mine, that meant once you have designed a mine as a longwall, you are going to mine it as a longwall, that's the design you have to stick to?

A. Pretty much, in a certain band width. In other words, your flexibility is greatly diminished in terms of the plan compared to a room and pillar operation.

Q. If the panels originally ran east-west, it's going to be very difficult to make them turn around and run north-south, for example?

A. Yes. And expensive.

Q. I understand what you're saying.

A. It would also be very expensive to shorten the panels.

Q. How do you compare the length of the development period for a longwall mine as opposed to a room and pillar?

A. It's longer for a longwall mine.

Q. What is the order of magnitude; if you can?

A. Probably in the order of a year. It takes one year longer to get full production from a longwall operation than it would from a continuous miner operation.

Q. And how long is it for a continuous miner, one year versus two years?

A. No. I'm addressing it from the standpoint of from the point of time in which you begin to sink shafts and build surface features and all that sort of thing.

If it takes five years for a continuous miner operation to go to full production, it would take six for a longwall operation to get to full production.

Q. Whatever it is for a longwall, you just add one year, essentially?

A. That's my estimate.

You need to also understand that it is not a step function. You don't run—when I say to full production, you have a curve that gets to full production, and the shape of the curve would change.

It's more accurate to speak of it in terms of yearly production levels to full production and how much coal you get in the development phase.

Q. Room and pillar would get you to full production a year sooner, and is it also higher on each individual year in terms of extraction in those earlier years?

A. It would have to be somewhat higher, yes.

Q. With respect to the seam that is the focus of the Bailey Mine, initial sections, how far below the surface is that?

A. 560 feet at the shaft.

MR. HOFFMAN: Mr. Dahl, you have been very patient and I appreciate your time. Thank you very much.

MR. INGRAM: Give us a minute.

(Discussion off the record.)

EXAMINATION

BY MR. INGRAM:

Q. Mr. Dahl, yesterday you were discussing comparing the extraction ratios available in a room and pillar operation, as compared to a longwall operation. And you stated some numbers in terms of what you would expect to recover from various types of operations.

Now, were you referring generally—would those comments be applicable to underground mining in the Pittsburgh seam in Western Pennsylvania, Greene, Washington County area?

A. In—yes, within some band width, you know. Those are not highly accurate numbers, and I think I said 50 percent for room and pillar operations overall and maybe 60 to 65 for longwall operations overall, and in a given mine, in a given circumstance, those numbers might well reverse, but it's in that—it's just a judgment on my part that that's probably a pretty good number.

Q. And that is based upon your experience in coal mining in this general area in the Pittsburgh seam?

A. Right, right.

Q. And let me ask you this question: With respect to your estimate on longwall mining, I assume that that's based on here what we have called a longwall mine, where the method of coal extraction is with longwall mining equipment?

A. That's correct. And when I saw it's a longwall mine, I mean that continuous miners are used solely for the purpose of developing mains and submains and panel development headings for the longwall.

Q. Okay. And a room and pillar mine is one where the method of coal extraction is room and pillar mining with continuous mining equipment?

A. That is correct.

Q. All right. Now, in respect to a question from Mr. Hoffman, you indicated that one of the concerns that you had with the Subsidence Act and/or Regulations was Section 15, which you indicated gives an owner of surface the right to purchase coal.

In the planning for a mine, like the Bailey Mine, does that create difficulties for you, the fact that—

A. Yes.

Q. Section 15. Can you state whether or not that's because you don't know when those rights are going to be exercised?

A. That's correct. It makes it difficult to formulate not only a long range, but a short range plan for the efficient and safe operation of the mine.

Q. Now, Mr. Dahl, when you talk about what you would expect to recover from an underground mine in the Pittsburgh seam, room and pillar, based on your experience, you would expect to be able to recover approximately 50 percent of the coal, depending on what circumstances you encounter, and in a longwall mine, 60 to 65 percent, again depending on the circumstances.

Assuming that there were no economic or, let's say, quality or safety constraints, would it be possible, technically possible, to mine more coal under either type of mining plan?

A. Yes.

Q. On a theoretical basis, what would be the maximum amount of coal you could extract, would you say?

A. I would be hard pressed to answer that question. That's a question of—if you exclude costs—

Q. It's probably a question only a lawyer would ask.

A. If you exclude cost considerations, you know, I guess it would be theoretically possible to mine in excess of 90 percent of all the coal, if you were getting ten times as much for it as we're getting.

Q. Okay.

A. But that's about where you would be. You would be at some enormous multiple of where we are at in price.

Q. If economics and price were no object, you could get a lot more coal?

A. Yes.

Q. Now, yesterday you talked about certain of the circumstances under which underground mine operators are required to leave coal unmined, in Pennsylvania,

under the '66 Subsidence Act and amendments. And you mentioned barrier pillars within the coal mine.

And the purpose of those, what is the purpose, generally, of leaving those barrier pillars within the coal mine?

A. The purpose is, No. 1, to protect long-term development headings that you are driving from the pressures created by extraction.

And also, the purpose is to protect a specific mine from inundations of air or water or gas from adjacent mines.

Q. All right. And so that coal is left in place, in effect, to protect the underground mining operations and workings and the safety of the men; is that correct?

A. That's correct.

Q. Is it fair to assume, assuming that there is a market for the coal, that you minimize the amount of that coal to the maximum extent possible, consistent with the safe productive operation of the mine?

A. That is correct, you minimize the barrier pillars.

Of course, a barrier is left at the boundary. That's set by law, by regulation and by the Department of Mines in Pennsylvania.

Q. All right. To your knowledge, are those boundary barriers—what is the purpose of those?

A. Mostly just to protect against inundations from flooded mines adjacent.

Secondarily—well, just as important, to not interfere with the ventilation circuit in the mine, the air ventilation circuit.

Q. So if those two factors were not involved, you wouldn't leave that coal; is that right?

A. I would assume that the law would change and we wouldn't, yes. Those two factors would not be involved.

Q. There is no reason not to mine that coal, other than those two reasons?

A. That's right.

I would also say that the barrier coal, the stuff that protects the main lines, many times in the last years of the mine you will go in and mine some of the barrier coal, that stuff that you can easily get.

Typically I would say you don't get a whole lot of that coal, maybe 50 percent might be a number.

Q. I would like to focus your attention on the pillars of coal that are left in development entries for a longwall panel, and the pillars of coal that are left in development mining in a room and pillar operation.

What are the relative comparative sizes of those pillars? Are they the same size or are they typically different?

A. They would be about—

Q. In Consol's mining operation.

A. They would be about the same size, yes.

Q. Okay. Now, we have talked about development entries, and ye have one set of parallel entries going up on one side of the longwall panel. To mine the panel, there has to be another set on the other side of the panel; is that correct?

Q. In parlance, what are those, with respect to designations of those two sets of entries, what are they referred to?

A. In longwall mining you refer to them as headgate and tailgate entries, sometimes referred to as the mother gate.

Q. All right. The headgate is defined as the series of entries through which you haul the coal. The other one is the tailgate.

Q. All right. And what is the mining function of the one where you are not moving the coal out?

A. Oh, it's to provide, first, a series of entries to carry the airway that is used to ventilate the working space on the longwall.

Secondly, it's also an escapeway for the men to the face.

Q. Okay. So to have any longwall extraction, you have to have both a headgate and a tailgate, or two parallel sets on either side of the panel?

A. That is correct.

Q. Now, with respect to changing over from a longwall mine to a room and pillar operation, let's assume that it was economically feasible to do so—let me withdraw that question.

In order to operate an underground coal mine in Pennsylvania, whether it's room and pillar or a longwall mine, do you have to have certain mining plans and systems approved by various governmental agencies, like the Federal Mine Safety & Health Administration, the Pennsylvania Department of—Office of Deep Mine Safety?

A. Yes.

Q. So if you made a decision to change from a room and pillar operation to a longwall operation, or vice versa, would there be any difference in the kinds of plans and approvals that you would have to have from those agencies to make that switchover?

A. Yes.

Q. Okay. In terms of ventilation and—

A. Ventilation, roof control, power, all of the support, in general, all of the support operations necessary to operate the mine will have to be approved by various agencies.

Q. All right. So in other words, that is not a decision that you could make on a unilateral basis and implement, you would have to have approval from the government?

A. That's correct.

Q. You indicated that the Bailey No. 1 Mine, the cover or the distance between the surface and the coal seam was 560 feet.

Are you familiar with the topography, generally speaking, of the topography, is that generally uniform, or will portions of the mine be under greater cover than that?

A. That's kind of a minimum cover number. That's the depth of cover at the shaft, and obviously we picked the shaft location because it was shallowest to get to the coal. So in general, the depth of cover will be equal to or greater than the 560 feet in the Bailey No. 1 Mine.

I don't know what the maximum is, probably around 800 feet.

Q. And I believe you indicated that the seam thickness in this mine was 66 to 72 inches of minable height; is that right? Or is—

A. The main seam is 66 to 72 inches, yes.

Q. And is it Consol's intention to mine only the main seam?

A. With the longwalls.

Q. With the longwalls.

A. If you were mining a continuous miner operation, you would have to mine the main seam, the drawrock

and at least some of the roof coal, and that would be true for pillaring as well as for the development sections.

In other words, if you were to put a continuous miner operation in the Bailey Mine and you were to extract pillars with miners, you would end up having to take the main seam, the drawrock and some of the roof coal, which would result in approximately maybe a foot and a half more extraction thickness removed.

Q. Now, what impact, if there were a room and pillar operation and you had to extract that other material you just described, what impact would that have on the quality of the coal?

A. It would adversely affect the quality of the coal. Roof coal is higher in ash. The drawrock, of course, is 100 percent ash, and you can't clean 100 percent of the rock out of the coal as you mine it.

You also have some inefficiency in the preparation plant. Roof coal has, instead of containing maybe 11 or 12 percent ash in the seam, the roof coal would contain somewhere around 35 percent ash, and so it would—and much higher sulfur, for that matter.

Sulfur in roof coal is maybe 1 percent higher than it is in the main seam, and so the quality of the coal would be adversely impacted.

Q. Now, would that be one of the motivating factors in choosing the longwall extraction method, quality considerations?

A. Yes. In any area of the Pittsburgh seam where you have drawrock, one of the early advantages we saw way back in the early '70's to longwall was that we could improve—achieve a superior product by staying under the drawrock with the longwall.

The drawrock is kind of a weak layer of a foot, 16 inches or so of thickness that you cannot support, and

to try to mine under it with continuous miners, it just falls out.

With longwall, you support it.

Q. Excuse me one minute.

Mr. Dahl, yesterday you were talking about the amount of coal left in a boundary barrier around the coal mine, and you said that it was small or insignificant.

On a percentage basis, are you familiar with what kind of a barrier is required to be left by governmental agencies around the Bailey 1 Mine?

A. Well, I think in Bailey 1 right now it's somewhat in dispute. I think we had asked for a total of a hundred feet, and I think the Department of Mines has asked for something larger.

Q. I think you have resolved that, as a matter of fact.

A. Is that right? What is the number?

Q. I understand that, at least for the moment, you are required to leave 50 feet around the entire perimeter.

A. Well, a hundred feet including what the other mine has to leave. You see, we own both mines.

Q. You own both mines, that's a good point. You are right.

A. Okay. So there would be a total between Bailey 1 and Bailey 2, Bailey 2 and Bailey 3, there would be a total of a hundred feet left in between the mines in terms of barrier.

Q. And can you calculate roughly how much coal would be involved in those barriers?

A. Well, for Bailey 1, the number would be something like 1½ million tons.

Q. Okay. In terms of the whole reserve, I suppose that's a small percentage of the reserve, but in absolute terms, that's a lot of coal, isn't it?

A. That's almost a year's production. Yes, it's a lot of coal.

Q. Okay. It sounds like a lot to me.

Now, Mr. Dahl, I want to show you a copy of a document that is a draft stipulation that has been exchanged, like, I guess, batted back and forth by counsel, which we have used in other parts of these depositions, and I want to direct your attention to Paragraph 23, which contains a statement, which I would like you to read.

MR. HOFFMAN: Could we just make clear in the record that that's a draft that your office prepared, rather than mine?

MR. INGRAM: Yes.

MR. HOFFMAN: And that I have reviewed.

MR. INGRAM: Right.

A. Yes, I've read it.

Q. And I would like the record to reflect that this document that we are referring to in the deposition is a document that was prepared by counsel for plaintiffs, and counsel for defendants has had a copy of it and has looked it over.

All right. Now, do you agree generally with the statement in Paragraph 23?

A. In general, yes.

Q. Okay. And you talked about Bailey 1, Bailey 2, Bailey 3, and I'm not sure it is clear on this deposition, but a number of mines are contemplated; is that correct?

A. Yes. We have five mines planned in the Bailey complex.

Q. I believe you mentioned yesterday that the reserve was some 280 million tons?

A. Yes.

Q. All right. What is the projected life of Bailey 1?

A. 33 years.

Q. 33 years. And are you going to work 33 years to start Bailey 2, or would you phase that in while you're—

A. No. Consol, every year, puts together a long range plan for ten years in the future. The first three mines are—

MR. INGRAM: Do you want to excuse yourself?

MR. LLOYD: All right.

(Thereupon, Mr. Lloyd left the room.)

A. We put together a 10-year plan every year. The first three of those mines is planned within the next 10-year time frame. Two of them, in essence, are already committed, which is to say Bailey 1 is committed, the shafts for Bailey 2 are being sunk and committed. Bailey 3 is in what might be termed final conceptual status, and it's planned for '86, '87, something like that.

They are all fairly near term mining properties.

Q. So assuming everything else works out and you would be—now, are those planned to be longwall mines, as we have described them here today?

A. Yes. The 280 million tons of reserve I say is there is there assuming that it's longwall operation, No. 1, and No. 2, that we don't have severe problems with surface subsidence impacts.

MR. INGRAM: Okay. That's all I have. Thanks, Mr. Dahl.

MR. HOFFMAN: Two questions in response.

EXAMINATION

BY MR. HOFFMAN:

Q. If Mr. Ingram will put back in front of you Paragraph 23, you said you agreed with that in general.

I'm wondering if there are any things in specific that you do not agree with?

You seem to have qualified your answer. I just wanted to see any qualifications you may have.

A. Some of the words, you know, it's a question of degree. It says it often leads to more severe surface damage.

I would say it leads to more surface damage. You know, it's just a question of how it's worded.

The general meaning is all right, as far as I'm concerned. It's a question of whether you would say—how strong you would say certain parts of it. But I would say, in general, I think leaving pillars in place does not prevent subsidence, and it will lead to damage somewhere down the road.

The degree to which you incur that damage is certainly less visible and less certain than longwalling.

Q. Okay. We talked about that yesterday. We got your views on that yesterday?

A. Yes.

MR. HOFFMAN: Thank you. That's all I have. Thank you very much for all your time.

(Discussion off the record.)

MR. LLOYD: On transcripts that you produce for United Steel Corporation, we will ask for a separate set. I would like the record to show that I left the room for the last portion, and I want that excised from any transcripts that we get.

(Thereupon, at 2:15 o'clock p.m. the deposition was concluded.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Plaintiffs,

vs.

NICHOLAS DEBENEDICTIS, *et al.*,
Defendants.

DEPOSITION OF THOMAS R. LLOYD

Wednesday, November 9, 1983

The deposition of THOMAS R. LLOYD, called by the defendants for examination, pursuant to notice and the Federal Rules of Civil Procedure pertaining to the taking of depositions, taken before me, the undersigned, Sheryl L. Akerley, a Notary Public in and for the Commonwealth of Pennsylvania, at the law offices of Rose, Schmidt, Dixon & Hasley, 10th Floor, Oliver Building, Pittsburgh, Pennsylvania 15222, commencing at 2:57 o'clock p.m., the day and date above set forth.

THOMAS R. LLOYD

called as a witness by the defendants, having been first duly sworn, as hereinafter certified, was deposed and said as follows:

EXAMINATION

BY MR. HOFFMAN:

Q. Would you state your name and business address for the record?

A. I'm Thomas R. Lloyd. I'm employed as an attorney in the law department of United States Steel Corporation, 600 Grant Street, Pittsburgh, Pennsylvania 15230.

MR. INGRAM: Mr. Hoffman, on the record, I would like to interject at this point.

You and I discussed this prior to the beginning of Mr. Lloyd's deposition. Pursuant to the notice of deposition, we agreed to make available and expose to deposition the employees of the plaintiff companies on certain areas of inquiry.

I want to point out that Mr. Lloyd has familiarity, generally, with the coal acquisition process of United States Steel Corporation and United States Steel Mining Company.

He is, however, as he indicated, an attorney with United States Steel Corporation, and by exposing him to deposition, we do not want to indicate our waiver of such attorney-client privilege that may exist between Mr. Lloyd and his client, and reserve the right and Mr. Lloyd will, if necessary, exercise such privilege as he has and feels he has on behalf of his client.

MR. HOFFMAN: Okay. And just as a real short response, you know, this is a deposition which we noticed under Rule 30(b)(6), and we did not designate Mr. Lloyd, but allowed you to designate the appropriate person.

I honestly can't imagine that any questions I have in mind would implicate the attorney-client privilege.

If it is a problem, we will deal with it as it comes up.

THE WITNESS: If I might also fill out the rest of my employment, I'm an officer and director of the U.S. Steel Mining Co., Inc. It's a wholly owned subsidiary of United States Steel Corporation which conducts mining operations for—I'm sorry—coal mining operations for United States Steel Corporation.

BY MR. HOFFMAN:

Q. And what officer are you of U.S. Steel Mining?

A. I'm sorry, I'm the secretary.

Q. And is your responsibility in the law department of U.S. Steel really with relation to U.S. Steel Mining Corporation?

A. In addition to the United States Steel Corporation, that's correct. I have primary legal responsibility, with the exception of health, safety, antitrust and some environmental matters, all legal aspects of the activities of U.S. Steel Mining Co., Inc., and related activities of United States Steel Corporation pertaining to coal mining.

Q. Okay. And are there other lawyers within U.S. Steel Mining or U.S. Steel who share with you those types of legal responsibilities with respect to the mining aspects of the corporations?

A. As to coal mining in general, no, although I report to the senior general attorney, resource development and international, who in turn reports to general counsel.

Q. And how long have you worked for U.S. Steel?

A. You want employment and education?

Q. Sure.

A. I have a Bachelor's of Arts from Duke University in 1970. I spent a little over two years in the navy, received a juris doctor from Duquesne in January of 1976,

began practice in February of '76 in Pittsburgh with Rose, Schmidt & Dixon as an associate attorney; then became a staff attorney at United States Steel Corporation in February of 1979, which continues as my employment to date, and I picked up responsibilities for the mining company from the time of its formation in 1981.

Q. And do your responsibilities for U.S. Steel Mining include serving as in-house litigation counsel for litigation matters that are handled by outside counsel, such as this case?

A. Yes. It's my decision whether we would try any given case in-house, or whether we would refer it to outside counsel.

Q. And in this particular case, you are the liaison for Mr. Ingram and Mr. Reed within U.S. Steel Corp.?

A. Yes, I am.

Q. The general subject on which we asked an individual be designated was, I'm quoting, "The manner in which plaintiff corporations acquired the right to the support estate regarding their planned longwall/full extraction mining."

Do you feel comfortable to discuss that with respect to U.S. Steel Mining Corp.?

A. Yes, I do. It would be with respect to United States Steel Corporation, which in Pennsylvania owns the coal reserves which is mined by its subsidiary.

Q. Thank you.

How have you become knowledgeable as to those acquisition practices, and particularly those that predated 1979?

A. If I could attempt to, I would like to restrict my answer somewhat to what would be called in Greene and Washington Counties, Pennsylvania, or in South-

western Pennsylvania, the Pittsburgh or 9-foot or river vein or seam of coal, also called the Pittsburgh No. 8 seam, generally, I believe, known as the No. 8 seam in West Virginia.

My knowledge of our United States Steel Corporation's acquisition programs with respect to that seam of coal stem from a review of our in-house records, law department engineering and also abstracts of the titles produced by outside counsel held in our files that reflect the nature of our title to the coal and mining rights stemming from when it was initially acquired from the land owner.

Q. Let me just back up a step. That is to say, are you familiar with what United States Steel's longwall mining plans are?

A. Yes, in fact I am, in general terms.

Q. Okay. Why don't you—can you outline for us what those plans are?

A. With respect to existing mines in the Pittsburgh seam, in Pennsylvania, U.S. Steel Mining Co., Inc. operates a longwall in its Cumberland Mine in Greene County, and operates a longwall, in its Maple Creek Mine in Washington County.

When I say "Maple Creek Mine", for MSHA purposes, it's two mines. For subsidence permitting, I'm not sure whether it's one or two mines.

And our third currently operating mine in Greene County is the Dilworth Mine. That has no longwall in it at this time, but has had tentative plans, from time to time for the possibility of a longwall to be installed.

Our other active underground mine in Pennsylvania is the Robena Mine, which is currently on idle standby and has never had, to my knowledge, a longwall in it.

Q. And idle standby would mean like, unlike Dilworth, there are not tentative plans for a longwall at that mine?

A. By idle standby I mean the mine is being maintained idle standby with no coal being produced; ventilation and maintenance being maintained.

Q. And no active mining for the future?

A. No active mining currently.

Q. And is longwall mining going on at the Cumberland Mine at the present time, or has it gone on in the past?

A. Both.

Q. And the same at Maple Creek?

A. Correct.

Q. And those were all pre-primacy permits or primacy permits?

A. Both have been active prior to 1974. The date of installation of the longwall at each, I can't be sure of.

Q. Okay. But I think my question is: Have those two mines been brought under the primacy permitting, much as the Bailey Mine has, as we discussed this morning in the deposition that you were in attendance for?

A. Let me stop for a moment and ask my counsel. That's a very difficult question to answer.

MR. INGRAM: Off the record.

(Discussion off the record.)

BY MR. HOFFMAN:

Q. Let's go back on.

A. Back on the record.

All three mines, that is Cumberland, Maple Creek and Dilworth, are on the schedule for repermitting.

MR. HOFFMAN: Off the record.

(Discussion off the record.)

Q. Let me, in the meantime, show you a numbered paragraph that is No. 26, if you would review that.

There is a statement in there that says, "A majority of coal now being mined by the plaintiff mine operators was severed from the surface and appeared from 1890 to 1920."

Is that accurate, based on your knowledge of the coal acquisition practices—

A. Of United States—

Q. —of U.S. Steel?

A. United States Steel Corporation, in Greene County, primarily, I believe that to be generally accurate.

You might want to extend, in some questions, the 1890 date back a little bit earlier. It's my belief that the earliest severance in Greene County of the Pittsburgh seam dates from 1853.

Q. Okay. And the first sentence in the paragraph that you read, "Beginning well over one hundred years ago, surface owners began conveying away the title of coal and support estates beneath their property, while maintaining ownership of the surface estate", does that seem substantially accurate to you?

A. With respect to the United States Steel ownership of the Pittsburgh seam in Pennsylvania, I believe that to be true, yes.

Q. So the earliest would be about 1860, as you said?

A. 1863, yes, sir.

Q. Now, and it says in the second sentence we read a moment ago, it talks about the majority of coal.

I honestly don't know what the author meant by a majority of coal. I wonder if you could put any order of magnitude to that?

A. One is reluctant to say that in every case, but from my personal knowledge, reviewing something in the nature of a thousand mining severance deeds in Greene County over the last two and a half years, I have never seen a U.S. Steel Pittsburgh seam severance deed from which our title was sourced that did not have a waiver of the support estate.

Q. But my question was really as to the time, too. Was the—

A. The timing is correct, also, as mentioned earlier.

Q. But is a majority—I'm just wondering whether you would say that, oh, 80 percent of the coal was acquired during the 1890 to 1920 period; 50 percent?

I'm just trying to get an order of magnitude to the word "majority."

A. With respect to United States Steel Corporation's Pittsburgh seam in Greene County, I'd say 97 percent.

Q. Okay. You keep saying Greene County. Is there some difference with respect to Washington County, if you have mines there?

A. There is with respect—the reason I'm qualifying the answer is I have reviewed thousands of mining rights severance clauses in Greene County, but I would say hundreds, perhaps, in Washington County, and few elsewhere in Pennsylvania.

Q. Although you would feel a little less comfortable, I assume, in response to Washington County, has your survey of Washington County, the several hundred deeds,

given you some different sense of the timing of those acquisitions, as compared to the Greene County deeds that you have looked at in detail?

A. No.

Q. Do you have a reason to believe that the time of acquisition that you have described for U.S. Steel is substantially different than that for some of the other coal companies in Pennsylvania?

A. When you say "substantially different", in what way do you mean?

Q. Would, say, upwards of 80 percent of the coal rights have been acquired during the period preceding 1920?

A. With respect to the Pittsburgh seam in Pennsylvania, I would believe that for all operators, the severances would have occurred as early as or prior to the Greene County severances; historically the development of severances and mining of coal going in a southwesterly nature from roughly Pittsburgh, hence Pittsburgh seam.

Q. And this statement that you're making reference to is that 97 percent of the ones in Greene County pre-date 1920?

A. 97 percent of the Pittsburgh seam U.S. Steel purports to own in Greene County would have been acquired in severance deeds, in my opinion, stemming from that period of time.

MR. HOFFMAN: Mr. Ingram, can I just ask that since we have designated an individual from one of the companies, and he's made an effort to generalize, if there is something that any of your individual companies think is distinct about their operations on that issue, just to let us know, and if not, we will let the record stand with Mr. Lloyd's statement?

MR. INGRAM: Yes. Let me just, another thing, we are talking about longwall. Your question, your inquiry relates to planned longwall full extraction mining and—

THE WITNESS: Off the record.

(Discussion off the record.)

BY MR. HOFFMAN:

Q. Off the record we had a little discussion which indicated that there was no distinction with respect to U.S. Steel's acquisition practices by the nature of the mining method that would be used; that is to say, longwall, room and pillar, whatever, would all be the same.

A. Speaking about underground mining and not surface mining, that's correct.

Q. Okay. And indeed, the coal and surface rights were acquired insofar as they were at a time that predated the longwall operations that you have in practice today?

A. Ours, that's correct.

(Thereupon, Lloyd Deposition Exhibits Nos. 1 through 9 were marked for identification.)

BY MR. HOFFMAN:

Q. I hand you, Mr. Lloyd, what we have marked as Exhibits 1 through 8, which are copies of various deeds that Mr. Reed has been gracious enough to provide to me as examples of various types of deeds that were used by the various plaintiff companies to acquire the property rights at issue in this case.

And what I want to do first is just ask you to review them and tell me which ones of those involve United States Steel, if you can.

A. Exhibit 3, 4, 5, 6, 7, 8.

All I have got is 8. I can't identify No. 9. It may or may not be. I don't recall having looked at it.

MR. HOFFMAN: I was wondering whether Mr. Reed or Mr. Ingram could advise us who 1, 2 and 9 are.

MR. REED: Exhibits 1 and 2, I believe, will be examples of Helvetia Coal Company's—coal being operated by Helvetia Mine.

And Exhibit 9 represents a deed from Consolidation Coal Company.

BY MR. HOFFMAN:

Q. We now have, then, copies of six different forms of deeds involving U.S. Steel, and they are all slightly different one from the other.

Am I right about that?

A. I have not compared them. I assume—

Q. Physically they are all a little bit different, or most of them.

A. I guess, technically, we are not really looking at six different deeds. For example, Exhibit 3 appears to be an excerpt from an abstract.

And if I might—you probably want an explanation of what I'm saying there.

Q. Assume for a moment that my knowledge of property law is nil, and you will not only make a safe assumption, but be exactly correct.

A. When United States Steel Corporation acquires or tries to acquire title to coal, it endeavors to make sure that it is dealing with the true owner at the time, not someone that is purporting to sell us coal.

An examination is then conducted before a substantial amount of money changes hands, and that examination is done by local counsel or outside counsel in conjunction with in-house counsel and in-house engineering, perhaps draftsmen and others, and what is called an abstract of title is, in most cases, prepared.

That abstract is sometimes certified as true and correct excerpts of the records by outside counsel, sometimes not.

We, as a rule, endeavor to have it be certified as such.

The abstracts in our in-house files then contain copies, and the time period we're talking about, 1901, those copies are really excerpted, retyped versions.

So this George W. Guthrie et ux Barnes would not be a deed, either. It was excerpted and put in our files.

Q. So your understanding is this is an excerpt from the deed?

A. Yes.

Q. What would appear to be the operative portion of the deed?

A. Yes, sir, based upon the opinions of counsel that searched that title.

That would be the same with respect to Exhibit 4, Exhibit 5.

Exhibit 6 is different. That's copies of our in-house tract card and what appears to be a photostat of the deed, severance deed.

Q. Well, let's start on 6. 6 is then—the first two pages are copies of the tract cards?

A. From United States Steel Corporation files.

Q. And then thereafter, the page that begins with very large type, "This indenture", is the actual deed?

A. Photostat of the actual deed, that's correct, the actual severance deed.

7 is, once again, our tract cards photostated, and then what appears to be a photostat of the severance deed, again.

And 8 is, once again, photostats of tract cards and the severance deed.

Q. Okay. What is the tract card?

A. Our in-house records prepared by engineers, generally, or clerks at the direction of lawyers and engineers reflect what we believe, at a glance, to be our rights with respect to a given tract.

Q. So it is a quick summary on a prescribed form of what you think is the pertinent information that you use, rather than going back to the deed for your normal business?

A. Yes, because when you say "the deed", we're talking about, in some cases, thousands of deeds that eventually derived to the ownership that, in someone's judgment, is compressed and indexed in that tract card.

Q. Okay. What I have been trying to do is just determine whether, with respect to the issue that we are all interested in, which is the support estate, whether there is any repetitive magical language that appears in deeds for that issue, and I was just trying to determine myself whether that was true before I asked you.

I wonder whether you have, in your research, concluded that there are patterns?

A. In my opinion, there are patterns. There is no magic language.

The patterns stem from generally the time frame of the severance, and in addition, who the acquiring party was at the time of the severance.

That is to say, there were land men and/or entrepreneurs with respect to the Pittsburgh seam that went out and blocked out those reserves by acquiring from the surface owners, and where you have an acquisition made by J. V. Thompson, for example, who is a fairly

famous figure in the history of the Southwestern Pennsylvania coal acquisition, you would expect to see not exactly the same, but similar language in J. V. Thompson type deeds.

Q. Are any of the exhibits we have marked here a J. V. Thompson deed, or an abstract from a J. V. Thompson deed?

A. I should say yes, Exhibits 6 and 7.

I believe that to be so by noting that on our tract cards on 6, for example, it says, "Conveyed by J. V. Thompson per trustees."

Mr. Thompson went through a bankruptcy after he blocked out quite a bit of coal.

The grantee, then, of Thompson—I am guessing here a little bit—would have been, probably, Cumberland Coal Company.

Yes, I am. I'm sorry. In both cases, that was true.

Q. Was Cumberland Coal thereafter acquired by U. S. Steel, or is it a subdivision of U. S. Steel?

A. Cumberland Coal—I can't be sure in my answer there. Cumberland Coal, in addition to deeding properties to H. V. Frick Coke Company, which was a predecessor by merger of United States Steel Corporation, I believe Cumberland Coal Company was also acquired, but the chain of title for the coal rights, these two tracts, for example, was by separate document.

Q. Now, on the tract card it has, in the bottom, "Mining Rights", and it has a quote, which I think I located on the deed itself. And I assume it's supposed to be an exact quotation excerpt from the deed.

A. Yes, sir. You notice it says from the Jacob Haver deed. That means, in the opinion of the lawyer, that Haver was the grantee on the Thompson deed and Barnes

was the grantee on the Haver deed, and this language was probably then pulled off by the engineer to put on the front piece of the card, but this is the mining rights from that severance deed.

Q. So with respect to the issue of subsidence, the language is, quoting, "Together with the right to mine and remove all and every part of the same, without being required to provide for the support of the overlying strata or surface, and without being liable for any injury to the same or to anything therein or thereon by reason thereof."

A. I'm sorry, in order to accurately answer, I have to read on.

Q. Sure.

A. In this case, yes, I believe that's right.

Q. Now, is there any way you would be able to tell us who Joseph Barnes was, or how the land got from Barnes to Thompson?

A. Yes, there is a way I could tell you. I would need to go back and further review the abstract and trace the chain of title down from grantor to grantee to grantor to grantee. It's been done. There are records.

Q. Now, the date of the deed, June 28, 1918, on the top left-hand corner—

A. That would refer to the J. V. Thompson deed per trustees and J. G. Butler, Jr., to Cumberland Coal Company.

Q. So the date on which the deed from Haver to Barnes, at which point the surface rights are described and discussed, predates 1918, or it predates at least June 28th of 1918?

A. I would have to look.

Yes, sir, that's correct. The severance deed, that is the Haver to Barnes deed, is dated January 31, 1900.

Q. Are there any of the particular forms of the deeds that we have here that you have identified as U. S. Steel deeds that are more common than others, and I have in reference the thousand or so deeds from Greene County that you researched?

A. I can't answer as to one form being more common than others.

Q. Okay.

A. There is no magic language that I know of.

Q. When we have seen Exhibits 3 through 8, have we seen either all of the deed forms from this time period for U. S. Steel, or at least enough to get a representative sense of it?

A. You have not seen all of the forms of severance clause that might have been used with respect to the waiver of the support estate.

In terms of having seen a representative sample, to my knowledge, we have no coal ownership in underground coal in the Pittsburgh seam where I've seen that we did not have a waiver in the chain. But as some of these reflect, the waiver is made in some language as opposed to another language, the forms are not always exactly the same.

A. That's correct.

Q. Can I ask that if there is some formulation in a deed that you think is significantly different in its impact than any that we have shown here today, to bring it to our attention?

A. The ones in Steel that I've looked at?

Q. Yes.

A. Here today. You asked me a mixed question.

While, in fact, I can go ahead and answer it, no, I see no difference in effect from any of these.

Q. That is not what I asked.

— You have given us six different deeds from that time period, and some of which have one form of language as opposed to a different form of language that relates to the severance issue. And you have indicated that these are not necessarily every form of the deed that exists.

And I don't need in our record to go through every form of the deed. I guess I am just asking that if there is, to your knowledge, or based on some additional reviewing, some formulation that is, in your view, different than these—

A. In effect, as regards the waiver of the support estate—

Q. In the formulation of the language.

A. As regards the support estate.

Q. —to bring that to our attention, to provide us a copy of something.

A. I know of none.

Q. Okay. Fine.

I guess this may be superfluous to your designation, but is there anybody currently working for U. S. Steel Mining Company who knows more about how this land was acquired than you do?

A. No.

Q. Has U. S. Steel continued to acquire surface land and support rights subsequent to October of 1980 with respect to mine operations?

A. You said a mouthful. United States Steel Corporation acquires surface in connection with its mining operations and other operations all the time.

And yes, I know, as a matter of fact, United States Steel Corporation has acquired surface since 1980 and has acquired surface in conjunction with the mining operations since 1980.

Q. Let me make the question a little narrower. In October, I believe, of 1980, Section 4 of the Pennsylvania Subsidence Act was amended to allow the current owner of a protected structure to consent to have mining underneath his structure; in essence, to waive his rights under Section 4, and I'm just wondering if U. S. Steel has been engaged in the process of acquiring those rights.

A. We did that prior to 1980.

Q. Well, that is what this lawsuit is all about. I'm asking post 1980.

A. And I believe we have also done it subsequent to 1980.

I can check and make sure of the date.

Q. Okay.

A. I'm quite sure we have.

Q. Okay.

A. The exact dates, I can't be sure of, but in at least two instance with which I am familiar, yes, we did.

Q. Have you had any particular problems in doing so?

A. Yes, sir.

Q. Want to tell me about those?

A. What kinds of problems?

Q. Well, I'm asking: Have you had problems in securing the property for a fair price?

A. What we considered to be a fair price, in my opinion, yes.

Q. Can you pick one of the examples and tell us a little bit about it, so we can understand what you have in mind?

A. Yes. You're dealing with a situation where you have mentioned, you are buying surface, or that's pretty much the way—maybe I didn't characterize or paraphrase your statement exactly, but you're dealing with a situation where you already, you and the coal estates, already own an expressed written waiver of the support rights, and in addition, have recited, in some cases—in the case that I'm thinking of, in addition to waiver of the support estate, a right to enter in on the surface.

As regards the waiver of the support estate, in going back and trying to undermine the structure, which was entitled to support pursuant to Section 4 of the 1966 Act, we are not buying the surface and we were told that that would not be effective if we were to buy the surface and leave the structure there, our mine maps, our 6-month maps showing undermining or full extraction mining, would be rejected.

Our response to that was to rent the structure, obtain a promise from the owner that it would remain unoccupied for a period of time before and after undermining, and we paid rental on that in the interim period and agreed to pay for any damages that were done by the recent mining.

Q. That was post 1980?

A. Yes.

Q. And do you know what mine that's in connection with?

A. The Cumberland Mine.

Q. Okay. Any—

A. Another similar instance at the Cumberland Mine. Those were—in one instance it was a rental structure

to begin with, and the second where it was a house and we also paid moving expenses.

Q. And I don't mean to mischaracterize. To your knowledge, there are two such instances post October of 1980 that fit within that category of essentially, in your view, re-acquiring rights, but certainly acquiring—

A. There are more than two. There are two that I'm familiar with.

Q. Let me just go back to J. V. Thompson for one second.

What was his relationship to U. S. Steel?

A. None that I know of.

Q. He was not an employee, he was simply somebody who was in business and entered into contracts with U. S. Steel to sell land that he acquired?

A. No. J. V. Thompson was an individual who blocked out reserves of coal in Southwestern Pennsylvania by buying from the then farmers or surface owners, or others who had previously acquired, and when we say "blocked out", that meant bought adjoining tracts, so that one would have a field large enough to mine without holes in the ownership.

And then Mr. Thompson went bankrupt, and in most of the Washington and Greene County deeds where he is in the chain of title, he sold—his trustees in bankruptcy sold to our predecessors an interest in the chain of title.

Q. Are there any other individuals like J. V. Thompson who assembled large portions or large quantities of land?

A. I don't know.

Q. He was the one who comes to mind in that category?

A. Yes. In Greene and Washington Counties, he's very famous.

Q. Any estimates of what percentage of the land that U. S. Steel owns in Washington County that might have originated through a J. V. Thompson deed?

A. Deeds. No, no estimation. I have no idea.

MR. HOFFMAN: Okay. Hold on a second.

(Discussion off the record.)

THE WITNESS: To try and answer, there are significant blocks of Pittsburgh coal that we know historically had been owned by Thompson and went through the Thompson bankruptcy.

As part of my responsibilities for the company, these reviews were caused by our efforts to sell reserves, and where we have done that, and I know that at the Thompson estate, or I have some familiarity with the background of the title, as having flowed through that bankruptcy, we're willing, without review, to promise our buyer that we will convey the support, the waiver of the support right, the right to subjacent support, without even having looked, confident in our knowledge that if it came through that chain, it had the waiver of the right to subjacent support.

MR. HOFFMAN: I don't have anything else to ask. Thank you. I appreciate it.

(Discussion off the record.)

MR. HOFFMAN: Let's go back on the record.

Mr. Reed has provided me with some proposed language previously, and I want to read it to you and ask you whether it's accurate with respect to the deeds that we have been talking about; that is, Exhibits 3 through 8 for Washington and Greene Counties. Okay.

"In Western Pennsylvania, various deed language has from time to time been commonly used to sever title to the coal and surface support estates from the surface estate."

The language contained in Exhibits 3 through 8 is typical of that used to accomplish the severance of the coal and subsurface support estates from the surface estate in Washington and Greene Counties for U. S. Steel Pittsburgh seam acquisitions?

THE WITNESS: That's correct.

MR. HOFFMAN: Thank you.

MR. INGRAM: I have no cross examination, Mr. Lloyd.

(Thereupon, at 3:47 o'clock p.m. the deposition was concluded.)

LAWYER'S NOTES

Page Line

- | | | |
|----|----|--|
| 5 | 9 | Insert the word "labor", in front of "health". |
| 10 | 13 | Believe quote is inaccurate. |
| 11 | 11 | 1853 not 1863. |
| 17 | 14 | Insert "to" after "ux". |
| 17 | 20 | Change "What" to "That". |
| 20 | 15 | Add "sure" after "am". |
| 20 | 21 | Change "V" to "C". |
| 26 | 25 | Change "and" to "own". |

LLOYD DEPOSITION EXHIBITS ARE NOT
REPRODUCED HERE. SEE STIPULATIONS
OF COUNSEL JOINT EXHIBITS AS FOLLOWS:

Lloyd Ex. 1—Joint Ex. 4, p. 95
Lloyd Ex. 2—Joint Ex. 5, p. 99
Lloyd Ex. 3—Joint Ex. 6, p. 104
Lloyd Ex. 4—Joint Ex. 7, p. 106
Lloyd Ex. 5—Joint Ex. 8, p. 108
Lloyd Ex. 6—Joint Ex. 9, p. 110
Lloyd Ex. 7—Joint Ex. 10, p. 118
Lloyd Ex. 8—Joint Ex. 11, p. 125
Lloyd Ex. 9—Joint Ex. 12, p. 134

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
: ss:
COUNTY OF DAUPHIN :

MARYANNE LEWIS, being duly sworn in accordance
with law, does state as follows:

1. I am a Paralegal assigned to work in the Liti-
gation Section of the Office of Attorney General.

2. At the request of defendants' counsel in the case of
Keystone Bituminous Coal Mine Association v. DeBene-
dictis, I have reviewed the information supplied in plain-
tiffs' Answers to Interrogatories and based on them, have
prepared the tables attached hereto. In each instance,
the information on the tables is either directly taken from
the Answers to Interrogatories, or is derived from them
using only simple mathematical calculations.

3. The foregoing is true and correct to the best of my
knowledge and information.

MARYANNE LEWIS

Sworn to and Subscribed Before me this — Day of
December, 1983.

Notary Public

(EXHIBIT A)

TABLE I

Coal Left in Place to Support Section 4 Structures, April 27, 1966 to December 31, 1982			
Company & Mine	Total Coal in Mine (tons) ¹	Coal Left in Place for Section 4 (tons) ²	Section 4 Support Coal as % of Total
<u>Consol</u>			
Blackville #1	150,257,000	2,400,000	1.6%
Blackville #2	159,433,000	4,600,000	2.9%
Humphrey	157,300,000	1,950,000	1.2%
Renton	58,472,565	5,500,000	9.4%
Laurel	22,568,520	450,000	1.9%
Westland II	264,536,500	430,000	.16%
Montour #4	97,469,925	7,590,000	7.8%
*Total	909,037,510	22,920,000	2.5%
<u>USSM</u>			
Dilworth	160,148,660	458,812	.28%
Maple Creek	158,039,580	1,565,842	1%
Cumberland	130,153,710	1,381,000	1%
*Total	448,341,950	3,405,654	.75%
<u>Helvetia</u>			
Lucerne #6	68,947,200	278,000	.40%
Lucerne #8	22,680,000	11,000	.04%
Lucerne #9	18,136,800	50,000	.27%
*Total	109,764,000	339,000	.30%

¹ Source: Plaintiffs' Answers to Interrogatories, Nos. 1(a) and 1(b).

² Source: Plaintiffs' Answers to Interrogatories, No. 3(b).

TABLE II

Coal Purchased Under Section 15, April 27, 1966 to December 31, 1982			
Company & Mine	Total Coal in Mine (tons) ¹	Coal Purchased (tons) ²	Coal Purchased as Percentage of Total
<u>Consol</u>			
Blackville #1	150,257,000	0	0
Blackville #2	159,433,000	0	0
Humphrey	157,300,000	0	0
Renton	58,472,565	0	0
Laurel	22,568,520	0	0
Westland II	264,536,500	0	0
Montour #4	97,469,925	256,967	.26%
*Total	909,037,510	256,967	.02%
<u>USSM</u>			
Dilworth	160,148,660	0	0
Maple Creek	158,039,580	78,968	.04%
Cumberland	130,153,710	0	0
*Total	448,341,950	78,968	.01%
<u>Helvetia</u>			
Lucerne #6	68,947,200	0	0
Lucerne #8	22,680,000	0	0
Lucerne #9	18,136,800	0	0
*Total	109,764,000	0	0

¹ Source: Plaintiffs' Answer to Interrogatories, Nos. 1(a) and 1(b).

² Source: Plaintiffs' Answer to Interrogatories, No. 5(b).

Coal Left in Place to Protect Gas and
Oil Wells, Bodies of Water, and as Barrier
Pillars, April 27, 1966 to December 31, 1982

Company & Mine	Coal Left in Place for			Barrier Pillars ⁴	Total Left in Place as Percentage of Total
	Total Coal in Mine (tons) ¹	Oil and Gas Wells ²	Bodies of Water ³		
Consol					
Blackville #1	150,257,000	150,000	0	810,000	.62%
Blackville #2	159,433,000	475,000	0	59,000	.32%
Humphrey	157,300,000	1,283,000	0	68,000	.85%
Renton	58,472,565	1,189,000	0	794,000	3.3%
Laurel	22,568,520	0	0	490,000	2.2%
Westland II	264,536,500	102,000	0	N/A	.03%
Montoru #4	97,469,925	219,000	1,137,000	972,165	2.42%
*Total	909,037,510	3,418,000	1,137,000	3,193,165	.84%
USSM					
Dilworth	160,148,660	16,300	0	278,497	.18%
Maple Creek	158,039,580	529,975	0	954,284	.93%
Cumberland	130,153,710	360,000	0	0	.27%
*Total	448,341,950	906,275	0	1,232,781	.47%

Helvetia					
Lucerne #6	68,947,200	65,000	0	5,300,000	7.8%
Lucerne #8	22,680,000	35,000	0	400,000	2%
Lucerne #9	18,136,800	65,000	0	100,000	.90%
*Total	109,764,000	165,000	0	5,800,000	5.5%

¹ Source: Answers to Interrogatories, Nos. 1(a) and 1(b).

² Source: Answers to Interrogatories, No. 7(a).

³ Source: Answers to Interrogatories, No. 7(b).

⁴ Source: Answers to Interrogatories, No. 7(c).

EXHIBIT B

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
 : SS:
 COUNTY OF WASHINGTON :

THOMAS B. ALEXANDER, being duly sworn in accordance with law, does state as follows:

1. I am Chief of the Mine Subsidence Regulation Section within the Department of Environmental Resources and have held that position since 1978.

2. Previously, I served as a mining engineer within that section (1967-78) and worked in a variety of capacities, including as a mining engineer, for Republic Steel-Northern Coal Mines (1951-67).

3. Throughout my service with DER, I have been involved in the review and approval of the subsidence control aspects of mining plans submitted to DER by coal companies seeking permits to mine coal in Pennsylvania.

4. In addition, my staff and I receive from coal companies information as to all claims made under Section 6 of the State Subsidence Act by property owners for damages to protected structures, as well as the amounts paid over by the coal companies in settlement of those claims. I and my staff also personally review structures and surface features that have been damaged by subsidence.

5. Subsidence occurs as a result of the removal of coal from beneath the ground. The cavity formed in this process results in a loss of support to the overlying surface. Subsidence results when the cavity is filled when the strata and surface above the cavity subside or collapse into it.

6. When subsidence occurs on the surface, it usually results in a vertical drop in the level of the land, which appears in a saucer-like shape. Typically the vertical drop is between 40% and 60% of the height of the coal seam being mined. There are also horizontal effects to the subsidence. The subsidence area can range from 10 feet to 20 feet across to several hundred feet across.

7. The effects of subsidence on surface structures are felt initially in the structure's foundation. Any structure that depends upon a stable foundation to support it, can be damaged by surface subsidence which affects the stability of that foundation.

8. Subsidence under and of the foundation thereafter can result in other damage, such as the cracking of walls in various places of the structure. Those cracks can be several inches across.

9. Comparable effects can result to various surface and subsurface features as well. Roads can crack or sinkholes may develop in them. Pipelines overlying a mine can rupture. Surface stream beds, or rocks underlying underground water, can fissure, causing the water to flow to a lower elevation.

10. I have personally seen examples of the types of surface subsidence described in Paragraphs 6 to 9 above.

11. DER generally applies a 50% rule to prevent subsidence damage to protected structures and features. This rule is described in the Stipulation of Facts at Paragraphs 39 and in Exhibit 1 to my deposition. This method has prevented subsidence damage in approximately 98% of the Section 4 structures under which mining has occurred since 1966.

12. Our experience demonstrates that both full extraction room and pillar mining and longwall mining are unable to prevent subsidence damage to anywhere near

this extent, and that longwall mining is less able to do so of the two. It also shows that subsidence damage resulting from longwall mining tends to be more severe in terms of cost to repair the damage done than is damage resulting to structures under which 50% mining has occurred.

13. From April 27, 1966 through December 31, 1982, DER is aware of approximately 375 Section 4 structures which have been damaged by subsidence, out of approximately 14,000 under which mining occurred. Approximately 95% of the structures which were damaged were mined by the 50% mining method, and a greater portion yet of the 14,000 Section 4 structures under which mining has occurred were also mined by this method. The average settlement cost of repairing the subsidence damage for all those structures is \$6,255.00.

14. The total paid by coal companies during this period was \$2,339,544. The amount of coal mined was 772,705,204 tons, resulting in a Section 6 cost of \$.003/ton.

15. DER is aware of approximately 32 settled claims or subsidence damage to Section 4 structures in which the damage resulted from longwall mining. (DER granted several permits for longwall mining in the late 1960's, when it did not have information to conclude that subsidence damage would result.) The average settlement cost for repairing these structures has been \$9,682.67, or 54% greater than the average settlement cost for all structures.

16. One longwall mine which has operated in Pennsylvania is the Bethlehem Mines, Corp., Mine 32-33, in Cambria County. Longwall mining has been conducted there, as of 1981, under 22 Section 4 protected structures. 15 valid claims for subsidence damage were received (68% of the protected structures) with an aver-

age settlement value of \$7,409.00, or greater than the average for all claims.

17. In that mine, Bethlehem Mines has also conducted full extraction room and pillar mining under Section 4 structures, rather than 50% mining. Subsidence damage has resulted in 26 out of the 91 buildings (29%).

18. My opinion is that the greater damage from subsidence due to longwall mining results from the fact that the subsidence is more often non-uniform, that is, various portions of the surface subside by different amounts, thus increasing the stress on the structures.

19. It is further my opinion that longwall mining in other areas of Western Pennsylvania will continue both to result in a higher frequency of subsidence damage to protected structures and features than would 50% mining, and with a greater cost to repair that damage than with 50% mining.

20. The foregoing is true and correct to the best of my knowledge and information.

/s/ Thomas B. Alexander
THOMAS B. ALEXANDER

Sworn to and Subscribed Before me this 5th day of December, 1983.

/s/ [Illegible]
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Plaintiffs,

v.

NICHOLAS DEBENEDICTIS, *et al.*,
Defendants.

ANSWER TO AMENDED COMPLAINT OF DEFENDANTS
DeBENEDICTIS, ZULLO AND ALEXANDER

FIRST DEFENSE

1-2. State LEGAL CONCLUSIONS which require NO RESPONSES.

3-12. ADMITTED.

13-15. State LEGAL CONCLUSIONS which require NO RESPONSES.

16. As to the factual averments herein, defendants, after reasonable investigation, lack sufficient knowledge to form a belief as to the truth of the averments, which are accordingly DENIED. LEGAL CONCLUSIONS require NO RESPONSE.

17-18. LEGAL CONCLUSIONS require NO RESPONSE. Factual averments are DENIED.

19-20. ADMITTED insofar as they fairly and accurately paraphrase the substance of Sections 4 and

6(a) of the Subsidence Act. See Stipulation at Paragraphs 24, 32 and 34.

21. States a LEGAL CONCLUSION which requires NO RESPONSE.

22. ADMITTED only insofar as it fully and accurately sets forth the substance of Section 15 of the Subsidence Act. See Stipulation at Paragraphs 26-29.

23. It is ADMITTED that the subsidence regulations expanded the statutory obligations to support surface structures which are imposed by the Subsidence Act and that they became effective on the date stated. The averment that the statutory obligations were "limited", and that they had been "greatly" expanded, state LEGAL CONCLUSIONS which require NO RESPONSES.

24. It is ADMITTED that on July 2, 1983, DER published 25 Pa. Code § 89.147 and simultaneously suspended Subsection (a). Remaining averments state LEGAL CONCLUSIONS which require NO RESPONSES.

25. ADMITTED only insofar as it fairly and accurately sets forth the substance of Section 89.147(b) of the subsidence regulations. See Stipulation at Paragraph 33.

26. States a LEGAL CONCLUSION which requires NO RESPONSE.

27. DENIED. See Stipulation at Paragraph 34.

28-29. ADMITTED only insofar as they fully and accurately set forth the substance of Section 5(a) and 5(e) of the Subsidence Act.

30-31. It is ADMITTED that Sections 89.145(a) and 89.146(b) of the subsidence regulations were modified on July 2, 1983. Descriptions of them are ADMITTED only insofar as they fully and accurately state the substance of those regulations. See Stipulation at Paragraphs 24 and 31.

32. ADMITTED that on July 2, 1983, DER suspended Sections 89.145(d) and 89.146(e). Descriptions of them are ADMITTED only insofar as they fully and accurately set forth the substance of those provisions.

33. DENIED, except insofar as DER intends to require an operator to leave coal in calculated support areas beneath those structures and features described in Section 145(a). See Complaint at Paragraph 30, Stipulation at Paragraph 25. Otherwise DENIED.

34. DENIED as stated. It is ADMITTED that once coal has been left in place beneath protected structures, plaintiff companies have not been able to recover thereafter and as a practical matter will not be able to do so absent extraordinary circumstances. See Stipulation at Paragraph 24.

35. DENIED.

36-38. Defendants lack sufficient knowledge to form an opinion as to the truth of these averments, which are accordingly DENIED. LEGAL CONCLUSIONS require NO RESPONSES.

39. Defendants incorporate their answers to Paragraphs 1 through 38 above herein.

40. ADMITTED that long wall mining is a method of full extraction which involves the mining of a block of coal, known as a panel. The averments as to the dimensions of the panel are DENIED. See Stipulation at Paragraph 51. It is DENIED that long wall mining inherently involves extraction of all of the coal in the panel leaving no pillars.

41. The averments in the first two sentences describing room and pillar mining are ADMITTED. See Stipulation at Paragraphs 46-47. It is further ADMITTED that the total recovery in the mining areas from room and pillar operations is between 65% and 85%; defend-

ants lack sufficient knowledge as to the amounts recovered in development and in retreat mining to form a belief as to their truth, and that averment is accordingly DENIED. The remaining averment states a LEGAL CONCLUSION which requires NO RESPONSE.

42. It is ADMITTED that U.S.S.M. is conducting full extraction mining operations, including long wall operations, within this district. Defendants lack sufficient knowledge to form a belief as to the truth of the remaining averments, which are accordingly DENIED.

43. ADMITTED.

44. It is ADMITTED that Helvetia is conducting full extraction mining operations utilizing the room and pillar method. Defendants lack sufficient knowledge to form a belief as to the truth of the remaining averments, which are accordingly DENIED.

45. Defendants lack sufficient information to form a belief as to the truth of these averments, which are accordingly DENIED.

46-47. State LEGAL CONCLUSIONS which require NO RESPONSES.

48. ADMITTED with respect to the full extraction mining methods plaintiffs wish to utilize. DENIED with respect to the mining methods adopted by DER regulations to protect against subsidence damage.

49. Defendants lack sufficient knowledge to form a belief as to these averments, which are accordingly DENIED.

50-52. State LEGAL CONCLUSIONS which require NO RESPONSES.

53. Defendants hereby incorporate their answers to Paragraphs 1-52 above as if fully set forth herein.

54-58. State LEGAL CONCLUSIONS which require NO RESPONSES.

59. Defendants hereby incorporate their answers to Paragraphs 1 through 58 above as if fully set forth herein.

60. ADMITTED.

61. ADMITTED insofar as it fully and accurately set forth the substance of Section 15 of the Subsidence Act.

62. Defendants lack sufficient knowledge to form a belief as to the truth of this averment, which is accordingly DENIED. LEGAL CONCLUSIONS herein require NO RESPONSES.

63. Defendants lack sufficient knowledge to form a belief as to the truth of these averments which are accordingly DENIED.

64-66. State LEGAL CONCLUSIONS which require NO RESPONSE.

SECOND DEFENSE

67. This Court lacks jurisdiction over those aspects of Plaintiffs' complaint that challenges Pennsylvania's implementation of the subsidence control provisions of the Federal Surface Mining Control and Reclamation Act.

THIRD DEFENSE

68. Those portions of plaintiffs' complaint that challenge Pennsylvania's implementation of the subsidence control provisions of the Federal Surface Mining Control and Reclamation Act are time-barred.

FOURTH DEFENSE

69. Plaintiffs failed to state a claim upon which relief may be granted.

FIFTH DEFENSE

70. This Court should abstain insofar as a complaint challenges a recently promulgated state regulation, 25 Pa. Code § 89.147.

SIXTH DEFENSE

71. This Court should abstain insofar as the Court challenges the enforcement and administration of a complex state regulatory program.

SEVENTH DEFENSE

72. Plaintiffs' complaint should be dismissed for failure to join parties under Rule 19, Fed. R.Civ. P., specifically the United States Department of Interior and landowners whose rights will be affected by the relief sought herein.

EIGHTH DEFENSE

73. Plaintiffs' claim is barred by laches.

Respectfully submitted,

LEROY S. ZIMMERMAN
Attorney General

By: /s/ Robert B. Hoffman
ROBERT B. HOFFMAN
Deputy Attorney General

MARC RODA
Assistant Counsel
Department of Environmental
Resources

ALLEN C. WARSHAW
Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg PA 17120
(717) 783-1471

Date: December 6, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C.A. No. 82-2712

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Plaintiffs,

v.

NICHOLAS DEBENEDICTIS, *et al.*,
Defendants.

JOINT MOTION FOR RECONSIDERATION OF
DENIAL OF PRIOR SEPARATE REQUESTS
FOR CERTIFICATION

The above parties, by their respective counsel, hereby jointly move this Honorable Court pursuant to 28 U.S.C. § 1292(b) to reconsider its decision to deny certification of those questions already decided and in support thereof state as follows:

1. Following this Court's April 4, 1984 Order, substantial questions nevertheless remain undecided in this case. These include whether the statutes and regulations found by this Court to be constitutional, either on their face or as applied in individual instances, are nevertheless unconstitutional when their cumulative impact upon plaintiffs' operations is considered.

2. Both parties agree, and respectfully submit, that the resolution of these questions will involve complex and voluminous proofs. For example, the plaintiffs currently operate 13 mines which, to varying degrees, have been directly affected by each of the challenged provisions. Consequently, plaintiffs will likely be required

to first offer proofs relating to the nature of their investment backed expectations for several mines. Mine by mine proofs will probably be necessary because the dedication of capital investment to each mine was based upon, among other things, time and site specific considerations such as market and labor conditions, the type and quality of coal (*e.g.*, metallurgical, steam or industrial) to be mined and the rates of return available on the capital at the time or times it was invested in a particular project.

In turn, defendants will likely be required to offer proofs of a similar nature. Furthermore, because the cumulative effect of the application of each challenged provision may be dependent upon, among other things, site specific geology, mining techniques as well as the location and concentration of protected structures and features, plaintiffs and defendants will likely be required to offer several completely different sets of proofs on the extent to which the plaintiffs' investment backed expectations have been or have not been destroyed. To develop these proofs will require both parties to retain experts trained in a variety of disciplines and the cost in time and money will be significant. In addition, the parties believe the trial time necessary to permit a full development of such proofs will be very substantial.

3. While the defendants believe this Court's judgment that the challenged provisions were constitutional *per se* was correct they nevertheless concur with plaintiffs' view that this question will ultimately be controlled by how the federal appellate courts construe the applicability of certain decisions of the Supreme Court of the United States to those facts so far developed. Furthermore, should an appellate court disagree with this Court's February judgment *in toto* then the time and money involved offering proofs and resolving disputed facts relating to *de facto* constitutionality will have been needlessly spent.

4. In addition, if an appellate court disagrees with this Court's February decision in part but concurs with the view that the *de facto* claim is nevertheless viable, the parties believe that a remand for new findings on the *de facto* issue may well be necessary. The reason for this belief is that neither party is currently in a position to properly present proofs relating to the overall impact of the challenged provisions until it is first finally determined what provisions are *per se* valid. If one of the provisions is not properly applied, then the impact which the other provisions have upon the plaintiffs' investment backed expectations is directly affected.

5. In their initial post-judgment motion, the plaintiffs requested this court to modify its judgment *and* to certify those portions left unmodified. They did not request a modification without an accompanying certification, the relief granted by this Court. The sole reason why plaintiffs filed their post-trial motion was to limit the issues which would be before the Court of Appeals for the Third Circuit. They did not wish to delay appellate review.

6. In their reply to plaintiffs' initial post-judgment motion the defendants also requested this Court to certify those portions of the Court's February judgment which were not modified.

WHEREFORE, the parties respectfully request this Court to reconsider its decision not to certify as immediately appealable the issues already decided.

Respectfully submitted,

ROSE, SCHMIDT, DIXON & HASLEY

By

RICHARD DiSALLE

By /s/ Henry McC. Ingram
HENRY MCC. INGRAM

By /s/ Thomas C. Reed
THOMAS C. REED

900 Oliver Building
Pittsburgh, Pennsylvania 15222-5369
(412) 434-8600

Attorneys for Plaintiffs

OFFICE OF THE ATTORNEY GENERAL

By /s/ Robert B. Hoffman
ROBERT B. HOFFMAN

Attorneys for Defendants

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

March 24, 1986

Mr. Rex E. Lee
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Re: Keystone Bituminous Coal Association, et al.,
v. Peter S. Duncan, Philip Zullo and Thomas B.
Alexander
No. 85-1092

Dear Mr. Lee:

The Court today entered the following order in the
above entitled case:

The petition for a writ of certiorari is granted.

Very truly yours,

/s/ Joseph F. Spaniol, Jr.,
Clerk
JOSEPH F. SPANIOL, JR.

PETITIONER'S BRIEF

No. 85-1092

Supreme Court, U.S.
FILED
MAY 23 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

KEYSTONE BITUMINOUS COAL ASSOCIATION, HELVETIA
COAL COMPANY, ROCHESTER & PITTSBURGH COAL COM-
PANY, U.S. STEEL MINING Co., INC., UNITED STATES
STEEL CORPORATION, and CONSOLIDATION COAL COM-
PANY,

Petitioners,

v.

PETER S. DUNCAN, PHILIP ZULLO,
and THOMAS B. ALEXANDER,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

REX E. LEE *
BENJAMIN W. HEINEMAN, JR.
MICHAEL A. NEMEROFF
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Counsel for the Petitioners

* Counsel of Record

May 23, 1986

60 p/2

QUESTIONS PRESENTED

1. Whether the court of appeals properly distinguished this Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), in holding that a state can compel mine operators to abandon their coal in the ground in order to serve the state's interest in economic development without violating the Takings Clause of the Fifth Amendment.

2. Whether the court of appeals correctly held that, when state legislation severely impairs a private contract, the standard of review under the Contract Clause of the Constitution is no different than the standard which governs a substantive due process challenge to such laws.

LIST OF PARTIES

The caption of the case contains the names of all parties.*

* The petition for a writ of certiorari contains the disclosures required under Rule 28.1 of the Rules of this Court.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1092

KEYSTONE BITUMINOUS COAL ASSOCIATION, HELVETIA
COAL COMPANY, ROCHESTER & PITTSBURGH COAL COM-
PANY, U.S. STEEL MINING CO., INC., UNITED STATES
STEEL CORPORATION, and CONSOLIDATION COAL COM-
PANY,

Petitioners,

v.

PETER S. DUNCAN, PHILIP ZULLO,
and THOMAS B. ALEXANDER,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 771 F.2d 707. The opinion of the district court (Pet. App. 26a-42a) is reported at 581 F. Supp. 511.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a) was entered August 26, 1985. On November 20, 1985, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including December 24, 1985. The petition for a writ of certiorari was filed on December 23, 1985, and granted on March 24, 1986 (J.A. 302). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

UNITED STATES CONSTITUTIONAL PROVISIONS AND STATE STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

“[N]or shall private property be taken for public use, without just compensation.”

Article I, Section 10, clause 1 of the United States Constitution provides in pertinent part:

“No State shall . . . pass any . . . law impairing the Obligations of Contracts.”

Sections 4, 5(e), and 6 of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act (“Bituminous Coal Act”), 52 Pa. Cons. Stat. Ann. § 1406.4, § 1406.5(e) and § 1406.6, are reproduced in the appendix to the petition (Pet. App. 49a-56a). In addition, the following state regulations: 25 Pa. Admin. Code § 89.145 and 25 Pa. Admin. Code § 89.146 (“DER Regulation”), are reproduced in the appendix to the petition (Pet. App. 61a-65a).¹

STATEMENT OF THE CASE

1. Petitioners are owners of coal properties and operators of underground bituminous coal mines in Western Pennsylvania, and an association of coal mining companies. Pet. App. 4a. Pennsylvania property law has long recognized three separate and distinct estates in land: the surface, the mineral (in this case coal), and the right of surface support (the support estate).² Each

¹ Subsequent to the filing of this lawsuit, the regulations were modified in immaterial ways and Sections 89.145 and 89.146 were consolidated and renumbered as 25 Pa. Admin. Code § 89.143. Petitioners will continue to refer to the relevant provisions as Sections 89.145 and 89.146.

² See *Captline v. County of Allegheny*, 74 Pa. Commw. 85, 459 A.2d 1298, 1301 (1983), *cert. denied*, 104 S. Ct. 1679 (1984); *Young v. Thompson*, 272 Pa. 360, 361, 116 A. 297 (1922); *Graff Furnace Co. v. Scranton Coal Co.*, 244 Pa. 592, 596, 91 A. 508, 509 (1914).

of these state-defined property interests can be owned by different persons at the same time.³ Almost all of the coal in petitioners' mines lies hundreds of feet beneath surface land which is not owned by petitioners.

Extraction of underground coal naturally leads to subsidence of the earth overlying the coal (J.A. 177-178), but not necessarily to any damage to surface land. Earth and other materials that rested on the coal simply sink or shift to fill the space left when the coal is removed.⁴ Accordingly, to enable them to mine all of the coal without obligation to support the overlying surface land (i.e., prevent subsidence) and without potential liability for damage caused by surface subsidence, petitioners or their predecessors in interest purchased (a) the underground coal, (b) the separate and distinct support estate, and (c) an explicit release of liability for damage to the surface or surface structures caused by subsidence, a release which under well-settled principles of state law runs with the land. *E.g.*, *Kellert v. Rochester & Pittsburgh Coal & Iron Co.*, 226 Pa. 27, 74 A. 789, 790 (1909).

Contracts under which landowners retain the surface estate, but convey both the mineral and the support estates in their property to others are common in Western Pennsylvania, and are referred to as “severance deeds.” J.A. 93-94. Today, approximately 90% of the underground coal in Western Pennsylvania that petitioners will mine was severed from the surface estate between 1890 and 1920. J.A. 93-94.

Under such contracts, petitioners or their predecessors in interest acquired both the coal and the right to mine

³ See *Charnetski v. Miners Mills Coal Mining Co.*, 270 Pa. 459, 463, 113 A. 683, 684 (1921); *Penman v. Jones*, 256 Pa. 416, 421-422, 100 A. 1043, 1044 (1917).

⁴ See Pet. App. 5a; J.A. 89, 177-178; see generally Ingram, *Regulation of Mine Subsidence—Legal Issues Raised by Government Intervention in Historically Private Arrangements*, 5 Eastern Min. L. Inst. 6.01[2] (1984) (The author is one of the attorneys for petitioners).

all the coal they purchased, notwithstanding any resulting surface subsidence. Pet. App. 5a. In each case, the owner of the surface estate sold both the mineral and the support estate, and released the coal companies from any liability for injury to the surface caused by subsidence due to underground coal mining. *Id.* The language of the contracts leaves no doubt as to their purpose or intended effect (J.A. 99, 101-102):

[The owners] grant, bargain, sell, alien, enfeoff, release, convey and confirm unto [the buyer:] ALL THE COAL of whatever kind lying or being in or upon all that certain tract of land . . . described as follows. . . .

* * * *

TOGETHER with the right to mine and remove all of said coal, without being required to provide or leave support for the overlying strata or surface, and without being liable for any injury to the said overlying land or to the structures thereon, or the springs or water courses therein or thereon, by reason of the mining and removing of said coal or other coal on lands adjacent thereto

The severance deeds thus shifted the risk of subsidence to the surface owners, and freed the coal mine operators to remove all the underlying coal without liability for damage to surface structures caused by subsidence.⁵

2. Respondents are state officials responsible for enforcing Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, 52 Pa. Cons. Stat. Ann. §§ 1406.1 *et seq.* ("Bituminous Coal Act"), and the implementing regulations of the State Department of Environmental Resources ("DER"). The stated purposes of the Act are

⁵ The precise language in the severance deeds varies, but the purpose and effect in each case was the same. See J.A. 95-134. The parties stipulated that the deeds in the record, introduced as joint exhibits, are representative of the severance deeds under which petitioners hold both the mineral and support estates and obtained releases from liability for damage to the surface and surface structures. J.A. 93-94.

to protect the public health, safety and welfare against injury caused by mine subsidence, and to preserve surface land, thus enhancing the State's tax base. See 52 Pa. Cons. Stat. §§ 1406.2, 1406.3; Pet. App. 6a. Section 4 of the Act prohibits mining that causes subsidence damage to specified surface structures in place in 1966, such as non-commercial, publicly-used buildings and occupied dwellings. Pet. App. 6a. DER expanded this restriction to prohibit full extraction mining under a variety of other surface features. DER Regulation 89.145 (Pet. App. 61a-63a).

To implement the prohibition against damage to surface structures, DER's regulation "requires coal operators to leave 50 percent of their coal in place for support under structures and features protected" under the Act and regulations, unless the operators prove to DER that leaving less support coal will not result in any subsidence damage. DER Regulation 89.146 (Pet. App. 28a). The qualification is of no practical significance, because it is undisputed that petitioners cannot make the required showing.⁶ Neither the Act nor the regulations, however, makes any provision for compensation for the operators' lost right to mine the coal left to support the surface.⁷

⁶ Respondents' answer to the complaint admits that "[n]one of the [petitioners] can demonstrate that their underground mining operations will prevent or avoid all subsidence damage to the surface and subsurface lands, structures and features overlying their underground operations." J.A. 28, 295. Thus, respondents concede that it is impossible to obtain a waiver for the kind of coal mining petitioners have done in the past and propose to do in the future.

⁷ Under Section 15 of the Act, anyone who owns or intends to build a surface structure that is not covered by Section 4 may compel the owner of underlying coal to sell support for the surface at a price to be determined by mediation. In addition, if the surface owner purchases support under Section 15, the coal owner is thereafter responsible for any damage to the surface structure that results from mine subsidence.

Section 6 of the Act requires coal operators to compensate for or repair any damage caused by mine subsidence to surface structures covered by Section 4 of the Act. 52 Pa. Cons. Stat. Ann. § 1406.6 (Pet. App. 50a-56a). The language of the severance deeds demonstrates that the reason for purchasing the separate support estate and release in addition to the coal property was to shift the risk of subsidence to the surface owner. Nonetheless, Section 6 of the Act makes the coal mine operator strictly liable for any damage to the surface structures specified in the Act, thus nullifying the contract provisions between coal mine operators and surface owners that expressly release the coal companies from liability for damage caused by subsidence.⁸

3. Apparently, there were no state legislative hearings on the Bituminous Coal Act to consider the impact of subsidence on the State or to evaluate alternatives to abrogating the rights of the coal companies. In 1965, the Pennsylvania House of Representatives unanimously passed House Bill 1915, less than two weeks after it was introduced and without debate.⁹ The Pennsylvania Senate adopted amendments to HB 1915 to address concerns about its constitutionality in light of this Court's decision in *Pennsylvania Coal Co. v. Mahon*, concerns which had been raised by the State Attorney General.¹⁰ The most significant of the Senate amendments was a procedure for compensating coal company operators for the

⁸ Section 6 is applicable even if the coal mine operator leaves unmined 50% of the coal underlying the structure as required by Section 4 and DER's regulations.

⁹ See *Pennsylvania General Assembly Legislative Journal* ("Legislative Journal")—House 1975-1976 (HB 1915 introduced Sept. 1, 1965), 1979 (Reported from Committee Sept. 1, 1965), 2022 (Second reading, Sept. 8, 1965), 2064-2065 (Third reading and final passage, Sept. 13, 1965).

¹⁰ See *Legislative Journal*—House 2947 (Remarks of Rep. Dardannell, Dec. 20, 1965); *Legislative Journal*—Senate Special Session 10 (Remarks of Senator Stroup, March 2, 1966).

nullification of their property and contract rights.¹¹ The House rejected the Senate amendments to HB 1915,¹² and the General Assembly adjourned without enacting a bill.

Early the next year, the General Assembly reconvened in special session, and enacted the Bituminous Coal Act, without substantial debate.¹³ The legislative history thus contains no substantial discussion of the need for Sections 4 and 6 of the Act or why alternatives to Section 6 such as the state-sponsored insurance program established to protect surface owners from loss occasioned by mine subsidence, Act of August 23, 1961, P.L. 1068, as amended, 52 Pa. Cons. Stat. Ann. §§ 3201, *et seq.* (Purdon 1985), were inadequate.

4. Every mine operated by petitioners has at least one structure protected by Sections 4 and 6 of the Act on the surface over the mine. It is undisputed that, to comply with Pennsylvania's statute and regulations, petitioners have been forced to leave approximately 30 million tons of coal in their mines, and ultimately will be

¹¹ See *Legislative Journal*—Senate 1473-1474 (Dec. 13, 1965) (amendment that would require compensation from surface owner for support coal or relieve coal company of obligation to leave support and eliminate liability for subsidence damage).

¹² See *Legislative Journal*—House 2877-2878 (Dec. 17, 1965), 2946-2953 (Dec. 20, 1965).

¹³ See *Legislative Journal*—House Special Session 8 (Feb. 28, 1966), 29 (HB 13 introduced, referred to committee, reported out of committee, and first reading, April 12, 1966), 31 (Second reading, April 13, 1966), 33-34 (Third reading and passage, April 18, 1966); *Legislative Journal*—Senate Special Session 43 (referred to Committee April 18, 1966), 44 (First reading April 18, 1966), 45 (Second reading, April 19, 1966), 47 (Third reading, April 20, 1966); see also *Legislative Journal*—Senate Special Session 3-14 (1966). The real differences between the version of HB 1915 that failed in 1965 and the bill enacted the next year are that the latter (1) contains a somewhat broader statement of purpose, general legislative findings and declarations of policy, and (2) distinguishes between existing structures and others, requiring support and imposing damage liability under Sections 4 and 6 only with respect to structures existing at the time the law was enacted. See pages 5-6 & note 7, *supra*.

required to leave millions of additional tons. Similarly, it is undisputed that no one can prove what amount of underground support will ensure against subsidence of the surface. Subsidence is a risk no matter how much coal remains and no one can predict the extent of any possible damage. Accordingly, the effect of the regulation is that at least 50% of the support coal must remain unmined under each "protected" structure.

In addition, the parties stipulated that DER's 50% requirement will make it infeasible for petitioners in certain situations to use the longwall method of coal extraction (J.A. 92), which has become for many coal mine operators the underground mining method of choice because it is more efficient and economical. See Pet. 5 n.5; Nilsson & Reddy, *Continuous Miners v. Longwalls*, Coal Age 58-66 (Mar. 1983). The inability of petitioners to use this method of extraction will necessarily increase petitioners' costs of producing coal and will have a significant detrimental effect on their ability to compete economically against coal extracted from other states where this restriction is not imposed. *Ibid.*¹⁴

Finally, petitioners own the mineral and support estates for land on which there are at least 3000 structures of the sort described in Section 4 of the Act and DER's regulations, see J.A. 36-37, 41-43; there are at least 14,000 such structures over coal mines in operation in Pennsylvania since the Act was passed. J.A. 90, 145. Without qualification, Section 6 of the Act nullifies the provisions of each of the contracts under which the surface owners released the coal companies from any claims for damage to surface structures caused by mining operations. Thus, in addition to leaving coal to support the structures described in Section 4 of the Act, petitioners are responsible for any damage that occurs to surface

¹⁴ Indeed, in some circumstances, the inability to use the longwall method will make it economically impracticable to mine the coal petitioners own. See J.A. 243-244.

structures under Section 6. J.A. 39-40. As the support pillars disintegrate, of course, petitioners' liability under Section 6 will increase. See J.A. 177-178.

5. Petitioners filed this lawsuit in the United States District Court for the Western District of Pennsylvania under 42 U.S.C. § 1983, alleging, *inter alia*, that Pennsylvania's statutes and regulations constitute a taking of petitioners' property without just compensation in violation of the Fifth and Fourteenth Amendments¹⁵ and that Section 6 of the Act impermissibly impaired petitioners' contracts with the surface owners in violation of Article I, Section 10 of the Constitution. Petitioners sought an injunction against respondents' attempts to enforce the State's statute and regulations and a declaration that the State's scheme violated the Constitution. On the basis of the parties' stipulation, affidavits and other undisputed evidence, the district court entered a partial summary judgment for respondents (Pet. App. 26a-42a). The court found that no disputed facts existed on the issues of whether the statute and regulations were unconstitutional as either a taking or an impairment of contract, and the court of appeals affirmed (Pet. App. 1a-23).¹⁶

a. *The Takings Clause.* With respect to the taking issues, the court of appeals acknowledged that the statute struck down in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), "closely resembled parts of the Subsidi-

¹⁵ The prohibition against the government taking private property without just compensation has been extended to the states through the Due Process Clause of the Fourteenth Amendment. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

¹⁶ The district court later granted a joint request by the parties to certify the constitutional issues decided for interlocutory review pursuant to 28 U.S.C. § 1292(b). The court noted that "there is a substantial ground for a difference of opinion as to whether the above cited sections of Pennsylvania law are constitutional because a prior law dealing with the same subject matter was invalidated as unconstitutional in *Pennsylvania Coal Company v. Mahon*." Pet. App. 47a-48a.

dence Act challenged" in this case. Pet. App. 12a. Nevertheless, the court held that *Pennsylvania Coal* was not controlling because of the "significant differences in the respective statutes' scopes and purposes." *Id.* at 14a. The court pointed out that "[t]he Kohler Act was defended as legislation designed to protect personal safety" and not public safety. *Id.* at 13a. "In contrast, the Subsidence Act at issue here does seek to prevent common or public damage." *Id.* at 14a. More specifically, the court determined that the Subsidence Act was "designed to protect the environment of the Commonwealth [and] its economic future. . . ." *Id.* at 14a.

With respect to the extent of the State's interference with petitioners' property rights, the court held that, state law notwithstanding (see pages 2-3, *supra*), it would be inappropriate to analyze petitioners' right to the support estate as a distinct property interest. Pet. App. 15a. The court then analyzed petitioners' reasonable investment-backed expectations in purchasing the state-recognized right to the support estate, and held that "a property owner's reasonable expectations as to the possible uses of his property are always circumscribed by the limitations on its use that may be imposed by the state in the public interest." *Id.* at 17a. Accordingly, balancing the governmental action against the degree of interference with petitioners' property rights, the court of appeals held that there was no unconstitutional taking. *Id.* at 18a.

b. *The Contract Clause.* The court of appeals agreed with the district court that Pennsylvania's requirement that coal operators must pay for injury to protected surface structures caused by subsidence substantially impaired petitioners' contract rights. Pet. App. 19a. Nevertheless, the court emphasized that petitioners' contracts were private and therefore were subject to an extremely lenient standard of judicial review, akin to that employed by courts in reviewing economic legislation challenged on substantive due process grounds. Deferring to the State legislature's judgment as to the reasonableness of the

Act, the court held that the statute's protection of surface owners was justified notwithstanding the express and voluntary contractual release of such claims. Pet. App. 18a-20a.¹⁷

SUMMARY OF ARGUMENT

I.

A. In 1922, this Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, declared unconstitutional under the Takings Clause of the Fifth Amendment the Kohler Act, a Pennsylvania statute which, without compensation, compelled coal operators to leave their anthracite coal in the ground in order to support structures on the surface of the land. Decades later, in Section 4 of the Bituminous Coal Act, Pennsylvania has reenacted a virtually identical statute which, without compensation, compels coal operators to leave their bituminous coal in the ground again to support structures on the surface. In light of *Pennsylvania Coal*, Section 4 is clearly unconstitutional.

The effect of the two statutes on property rights is the same. Both require operators of coal mines to give up the only meaningful right that attaches to the coal operators' ownership of the support estate—the right to mine coal. 260 U.S. at 414. Moreover, both statutes abolish the support estate, which is a distinct property right defined by state law. This Court in *Pennsylvania Coal* described it as a "very valuable estate." *Id.* at 414.

¹⁷ The court of appeals also rejected two other claims made by petitioners. It rejected petitioners' claim that the private eminent domain provision of the Bituminous Coal Act, Section 15, 52 Pa. Cons. Stat. Ann. § 1406.15 (Purdon Supp. 1985), was an invalid attempt to take property for private use. Pet. App. 21a-23a. It also rejected petitioners' other Contract Clause claim, involving a regulation which requires coal operators to repair any subsidence damage to land *qua* land to the extent economically and technologically feasible. Pet. App. 21a. Petitioners have not sought review of those issues in this Court.

The court of appeals' only basis for distinguishing *Pennsylvania Coal* was on the ground that the Kohler Act served only a narrow, private purpose while Section 4 of the Bituminous Coal Act was intended to further broader public purposes. This reading of *Pennsylvania Coal* is directly refuted by the opinion itself, 260 U.S. at 414, and is inconsistent with this Court's own recent interpretation of *Pennsylvania Coal* as involving "a state statute that substantially furthers important public policies." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978).

B. *Pennsylvania Coal*, like any decision of this Court, is entitled to significant respect under the principle of *stare decisis*. But, the Court should be particularly protective of *Pennsylvania Coal* because it has been a leading case defining one of the basic rights affecting property in an area of the law, takings jurisprudence, which does not lend itself to any "set formula[s]." *Penn Central*, 438 U.S. at 124.

Moreover, the basic holding of *Pennsylvania Coal*—that the Takings Clause places limits on the government's exercise of its police powers—is a proper interpretation of the Constitution. The decision is consistent with the text and purpose of the Clause to protect basic property rights. It is also consistent with numerous decisions of this Court holding that the Takings Clause is not merely an eminent domain provision. See, e.g., *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177 (1872).

C. The court of appeals also misapplied this Court's decisions other than *Pennsylvania Coal*. First, the court below incorrectly attempted to balance Pennsylvania's interest in taking petitioners' coal against their interest in retaining and using their property rights. But the factors relied upon by this Court in deciding what constitutes a taking—diminution of value, interference with investment-backed expectations and physical invasion of property—all relate only to the impact of the regulation on the individual's property right. *Kaiser Aetna v. United*

States, 444 U.S. 164, 175 (1979). There is no basis in the Takings Clause for considering the magnitude of the state's interest in determining whether there has been a taking of the property.

Second, the court below misapprehended the nature of petitioners' property rights. The court ignored state law which has long recognized that petitioners' subsurface coal property and support estate are both separate and distinct estates in land. The court of appeals also held that petitioners' investment-backed expectations in the support estate, which were encouraged by the state's unique definition of that property right, were unreasonable because they were subject to the state's need to protect the public interest. This reasoning is flatly inconsistent with this Court's decision in *Kaiser Aetna*, 444 U.S. 165, which held that the marina owners' investment-backed expectations in creating the marina had been reasonable, notwithstanding Congress' continuing interest in protecting navigation.

II.

A. In upholding Section 6 of the Bituminous Coal Act, the court of appeals effectively repealed the Contract Clause as it applies to state laws severely impairing the contracts of private parties because it improperly used a highly deferential, rational relationship test rather than the "reasonable and necessary" test established by this Court's Contract Clause cases. The issue of the proper Contract Clause standard of review is clearly and sharply presented because it was conceded below that, under the contracts, the surface owners were to bear the cost of subsidence damage but that, under Section 6, contract rights were destroyed and those costs were shifted to the mine operators.

B. In reconciling the basic tension in the Contract Clause between the reliance interests of the parties to a private contract and the interests of the states in meeting significant social and economic problems, the fundamental principle of Contract Clause adjudication is that the severity of the impairment determines the height of

the hurdle state legislation must clear. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). When, as here, a state law destroys substantive contract rights, it can be valid only if: (a) the state can show that the contract has consequences which are creating significant problems unforeseen at the time the contract was executed; (b) the state law is reasonable when evaluated under the criteria established in *Spannaus* and the seminal case of *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); and (c) the state could not have more carefully tailored its law to the problems it was designed to meet and more fairly balanced private contract rights against the public needs. By ignoring the "reasonable and necessary" test of this Court's Contract Clause cases, the court of appeals committed fundamental constitutional error.

C. Under the required standard of review, Section 6 of the Bituminous Coal Act is unconstitutional. The sparse legislative findings and legislative history evidence no attempt to justify the abrogation of petitioners' contract rights. The state (a) has not shown that Section 6 was intended to meet a significant, unforeseen problem; (b) has not met any of the *Blaisdell-Spannaus* "reasonableness" criteria because it has not shown that Section 6 was intended to address a broad, generalized economic problem, to protect a broad societal interest, rather than a narrow class, to operate in an area previously subject to state regulation or to be of limited duration; and (c) has not shown that Section 6 was carefully tailored to minimize destruction of substantive contract rights. The state has not explained why a pre-existing state insurance program which allowed surface land owners to defray subsidence damage costs without destroying petitioners' contract rights was not sufficient to achieve the state's purposes. States are not helpless to address important economic problems, but, if the Contract Clause means anything, it requires a state to undertake a careful, balanced approach in justifying severe impairments of private contract rights. This Pennsylvania has not done.

ARGUMENT

I. SECTION 4 OF THE PENNSYLVANIA BITUMINOUS COAL ACT AND ITS IMPLEMENTING REGULATION HAVE TAKEN PETITIONERS' PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS

Since the adoption of the Fifth Amendment, the requirement that just compensation must be paid when government takes private property for a public purpose has been understood primarily as an eminent domain provision. See Blackstone's Commentaries app. 305-306 (G. Tucker ed. 1803); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). With the expansion of both state and federal regulation of private economic activities, however, the issue naturally arose whether governmental regulation in the public interest that deprived an individual of the use of property, even though the government did not formally condemn that property, nonetheless constituted a "taking" within the meaning of the Fifth Amendment. Stated differently, the constitutional issue posed by state economic regulation was whether the Takings Clause imposes restrictions not only upon the eminent domain authority of state and local governments, but also more broadly upon the government's exercise of its police powers.

This fundamental issue was definitively resolved in 1922 in one of this Court's leading "takings" cases, *Pennsylvania Coal Co. v. Mahon*, *supra*.¹⁸ The Court in

¹⁸ Actually, the holding in *Pennsylvania Coal* involved the concrete application of principles that had previously been recognized by the Court. The year before, the Court had stated, "there comes a point at which the police power ceases and leaves only that of eminent domain." *Block v. Hirsch*, 256 U.S. 135, 156 (1921). Even earlier, in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908), the Court argued:

"But if [government] should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights

that case, in an opinion by Justice Holmes, held: "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415. The Court further explained that if regulation does go "too far," then it constitutes a "taking," regardless of the nature or magnitude of the State's interest. This is because "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416.

Based on these principles, *Pennsylvania Coal* held that the Kohler Act, Pennsylvania's anthracite coal mining statute, which required operators to leave support coal in the ground, was unconstitutional. Remarkably, decades later, the Pennsylvania legislature, blatantly hoping that changes in this Court's composition would alter the outcome of *Pennsylvania Coal*,¹⁹ enacted a virtually identical statute which regulates bituminous coal mining in precisely the same way as the anthracite statute struck down by this Court in 1922. Like its predecessor decades before, this Pennsylvania statute and its implementing regulation restrict the coal industry's mining rights and deprive coal companies of significant property rights. Fidelity to the precedent of *Pennsylvania Coal* therefore requires the Court once again to declare the new act an unconstitutional taking of property without compensation.

In support of this contention, petitioners will first demonstrate that this case cannot meaningfully be distinguished from *Pennsylvania Coal*. Second, we will show that *Pennsylvania Coal* was rightly decided; no reason appears from the language or purpose of the Takings

of property would prevail over the other public interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain."

See Pumpelly v. Green Bay Co., 80 U.S. 166, 177 (1871); pages 26-27, *infra*.

¹⁹ See note 25, *infra*.

Clause to modify the holding in *Pennsylvania Coal* and thereby upset the reasonable expectations of property owners, such as petitioners, who have planned their primary commercial activities on the basis of that decision. Finally, we will show that the court of appeals and respondents have erroneously relied upon certain recent decisions of this Court which, when properly analyzed, are fully consistent with *Pennsylvania Coal*, and require reversal of the lower court's decision.

A. *Pennsylvania Coal* Cannot Be Meaningfully Distinguished From This Case.

1. Because the Court's decision in *Pennsylvania Coal* is central to the outcome of this case, a clear understanding of its facts and the holding of the Court is critical. *Pennsylvania Coal Co. v. Mahon* began simply enough. The Pennsylvania Coal Company executed a deed in 1878 conveying title to a piece of land in Pittston, Pennsylvania. The deed expressly reserved "all the coal and other minerals under, in or upon said lot of land. And also the right and privilege of mining and removing all the coal" ²⁰

For "several years" prior to 1921, the Pennsylvania Coal Company had been "engaged in the mining out and removing of the anthracite coal underlying" the Mahon's property.²¹ In September 1921, the Pennsylvania Coal Company sent the Mahons a notice that mining deep beneath their house would begin soon. Transcript of Record at 9.

The Mahons then filed an action in state court seeking an injunction against further mining under their house. They argued that the mining was prohibited by the Kohler Act, which had been passed several months earlier, on May 27, 1921. That Act prohibited mining "so as to cause collapse" of any "dwelling or other structure used

²⁰ Transcript of the Record at 7, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (hereafter "Transcript of Record").

²¹ *Id.* at 9, 13, 22.

as a human habitation" Pet. App. 57a. The coal company responded by claiming, *inter alia*, that the Act effected an uncompensated taking of its property and constituted a substantial impairment of its contract with the Mahons, in violation of the United States Constitution. Transcript of Record at 14. The trial court agreed with the coal company and refused to issue an injunction. *Id.* at 20-24.

The Pennsylvania Supreme Court reversed. Transcript of Record 69-85. That court emphasized the importance of the State's interest in protecting "the lives and safety of large numbers of the people of the Commonwealth" and argued that this justification "properly warrant[ed] the exercise of the police power" *Id.* at 71. In further support of its holding, the state court reasoned that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community" *Id.* at 72.

The dissenting justice examined the practical effect of the Kohler Act; "it is just as certain as anything can be that one-fourth to one-third of the coal must remain in place for surface support, for the coal owner, under the Kohler Act, will scarcely provide artificial support, by concrete or stone pillars, or otherwise, at a cost greatly exceeding the value of the coal." Transcript of Record at 84. Thus, he argued the statute simply "confiscates a well-defined property right." *Ibid.* Alternatively, he argued that the Act takes the support estate "from defendant and vests it in plaintiff without compensation." *Id.* at 80.

The opinion of this Court in *Pennsylvania Coal* essentially adopted the reasoning of the dissenting state court justice. The Court described the dual effect of the Kohler Act on property rights as follows. By compelling the coal operator to support surface structures, the Kohler Act "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate." 260 U.S. at 414. Moreover, to comply with the Act, the Penn-

sylvania Coal Company would either have to abandon the support coal or substitute some other support material making "it commercially impracticable to mine certain coal" which "has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Ibid.* The Court accepted the claim of those supporting the Mahons—the Pennsylvania Attorney General and the City of Scranton—that the Kohler Act "was passed upon the conviction that an exigency existed that would warrant it." *Id.* at 416. Nevertheless, the Court concluded that the magnitude of the State's interest was not relevant to the issue whether the State could "take" the coal company's property without providing any compensation for it. *Ibid.*

2. As both courts below correctly recognized, the language of the Kohler Act invalidated by this Court and Section 4 of the Bituminous Coal Act "closely resemble" each other. The Kohler Act declared it

unlawful for any owner, operator, director, or general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse or subsidence of—(d) Any dwelling or other structure used as a human habitation. . . .

Section 4 of the new Act states that

no owner, operator, lessor, lessee, or general manager, superintendent or other person in charge of or having supervision over any bituminous coal mine shall mine bituminous coal so as to cause damage as a result of the caving-in, collapse or subsidence of . . . (2) Any dwelling used for human habitation

Moreover, as would be expected from language that is so starkly similar, the effect of the Kohler Act on the petitioner in *Pennsylvania Coal* is identical to the effect of the Bituminous Coal Act on the petitioners in this case. In fact, the restriction may be greater here because

petitioners have been required to leave 50 percent of their coal under protected structures, while the Kohler Act may have required coal operators to leave only 25-33 percent of their coal in the ground. Transcript of Record at 80, 84.²² In addition, Pennsylvania continues to recognize the support estate as a distinct estate in land (see notes 2-3, *supra*), just as it did 65 years ago. Thus, the renewed effort to implement the Kohler Act's restrictions necessarily "purports to abolish . . . a very valuable estate." 260 U.S. at 414.

It is just as true today as it was in 1922 that "for practical purposes the right to coal consists in the right to mine it." And both the Kohler Act and the Bituminous Coal Act involve the same "physical restriction against the removal of coal." *Andrus v. Allard*, 444 U.S. 51, 66, n.22 (1979). Accordingly, if the present statute had been invoked by the Mahons in 1921 as a basis for seeking an injunction against the Pennsylvania Coal Company from mining under their property, there is no doubt that the result in that case would have been unchanged.

3. Although there is no meaningful way to distinguish the Kohler Act and the Bituminous Coal Act, the Third Circuit still held that *Pennsylvania Coal* was not controlling. The only distinction offered by the court of appeals was its contention that *Pennsylvania Coal* involved a statute supported by a very limited public purpose—to protect the safety of only some individuals on the surface. Thus, the court implicitly held that this Court's prior decision quite literally must be confined to its facts.

But this Court's analysis of the Kohler Act flatly refutes the court of appeals' argument. The court below emphasized that the *Pennsylvania Coal* case involved only

²² Moreover, the impact has become even more severe in recent years; it was not disputed below that the effect of the Act has been to hamper use of longwall and other full extraction mining which have become the preferred methods of mining bituminous coal. Thus, Pennsylvania's unique restriction has impaired petitioners' ability to compete with coal mined in other states. See pages 7-8, *supra*.

a single house (Pet. App. 12a). But this Court in *Pennsylvania Coal* explained that the Pennsylvania Attorney General and the City of Scranton had participated in the briefing of that case to present the State's interest and the Court explicitly took into account the broader public interest served by the statute in holding that it was unconstitutional. 260 U.S. at 414.²³ There is therefore no basis in the *Pennsylvania Coal* opinion for concluding that the decision rested in any way on the inadequacy of the State's interest. To the contrary, if the court of appeals were correct, this Court in *Pennsylvania Coal* would have had no reason to announce that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 260 U.S. at 416.²⁴

Moreover, the court of appeals' characterization of the *Pennsylvania Coal* holding directly conflicts with this Court's own subsequent recognition that *Pennsylvania Coal* is "the leading case for the proposition that a state statute that *substantially furthers important public policies* may so frustrate distinct investment-backed expectations as to amount to a 'taking'." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978) (emphasis added). Thus, the Court in *Pennsyl-*

²³ The court of appeals also pointed out that the present statute, by contrast to the Kohler Act, contains no exception for the situation where the surface is owned by the owner of the mineral rights and support estate. From this the Court inferred that the purpose of the new Act was much broader than the purpose of the Kohler Act. The court of appeals, however, ignored the proviso in Section 4 of the current Act, which allows the owner of the surface to waive his right to have his surface supported. 52 Pa. Cons. Stat. Ann. § 1406.4. Obviously, if the coal operator or owner also owns the surface, he will invoke this provision. Therefore, both statutes contain precisely the same exception.

²⁴ The interpretation below is also inconsistent with the Pennsylvania Supreme Court's controlling interpretation of the purpose of the Kohler Act, which was broadly to promote public health and safety. See page 18, *supra*.

vania Coal clearly held that the magnitude or scope of the state's interest is irrelevant to the takings question if the impact on the individual's property right is sufficient to constitute a taking. The court of appeals' analysis thus amounts to nothing more than a basic disagreement with this Court's analysis in *Pennsylvania Coal*.²⁵ At bottom, there is no constitutionally meaningful way to distinguish the purpose and effect of the Kohler Act from the Bituminous Coal Act. Accordingly, the court of appeals erred in not following *Pennsylvania Coal* and in refusing to declare Section 4 of the more recent law unconstitutional.

B. The *Pennsylvania Coal* Precedent Should Not Be Abandoned By This Court Because Of Its Importance To Takings Jurisprudence And Because It Is Consistent With The Language And Purpose Of The Takings Clause.

1. In an area of the law that has concededly been marked largely by case-by-case decision making by this

²⁵ It is worthy of note that when the Pennsylvania legislature enacted the Bituminous Coal Act it did not perceive any substantive differences between the purposes of the Kohler Act and the law it was enacting. In the face of an Attorney General's report indicating that the statute seemed clearly to conflict with *Pennsylvania Coal*, one legislator acknowledged that the Kohler Act "performed much the same as this particular measure." He nonetheless urged passage of Section 4 on the erroneous basis that "the vote [in *Pennsylvania Coal*] was a close one, four to three, to be exact. . . ." *Legislative Journal*—House 2947 (Dec. 20, 1965) (Remarks of Rep. Dardanell). In fact, the vote was eight to one. In addition, he argued "that the Supreme Courts have changed over the years, and certainly a reflection on some of the decisions which have been handed down recently would indicate that they are much more on the liberal side." *Ibid.* See also *Legislative Journal*—Senate 10 (Remarks of Sen. Weiner) ("This legislation . . . flies in the face of "*Pennsylvania Coal* . . . The Supreme Court has changed mightily in many areas.") Thus, the legislature did not have in mind any of the court of appeals' distinctions when it reenacted the Kohler Act to apply to bituminous coal mining.

Court,²⁶ the principles and holding of *Pennsylvania Coal* have served as the benchmark against which each new state regulation of property rights has been judged under the Takings Clause. Indeed, this Court has repeatedly cited these principles approvingly in many cases in which the "taking" issue was posed.²⁷ A prior decision of this Court is entitled to significant "respect" under the doctrine of *stare decisis*, and can be overruled only upon a clear showing both that the prior decision was clearly wrong and that it has created significant social problems.²⁸ Because the Takings Clause cannot be analyzed according to any "set formula," *Penn Central*, 438 U.S. at 124, it is particularly important for the Court to respect its prior decisions in this area. Absent compelling proof of a significant social problem created by a Takings Clause precedent, the Court should decline to decide any case in a way which would significantly undermine a prior holding, particularly one as important as *Pennsylvania Coal*.

No colorable reason exists for this Court now to depart from *Pennsylvania Coal* which has placed narrow and

²⁶ *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 105 S. Ct. 3108, 3124 & n.17 (1985); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

²⁷ See, e.g., *United States v. Riverside Bayview Homes*, No. 84-701 (Dec. 3, 1985), slip op. 4; *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. at 174; *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. at 127; *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958).

²⁸ See *City of Akron v. Center for Reproductive Health, Inc.*, 462 U.S. 416, 419-420 (1983); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272, 273 (1980); *Moragne v. States Marine Lines Inc.*, 398 U.S. 375, 404-05 (1970).

It is, in these circumstances, particularly fitting to recall the view of Justice Holmes on this issue: "[I]mitation of the past, until we have a clear reason for a change, no more needs justification than appetite. It is a form of the inevitable to be accepted until we have a clear vision of what different things we want." O. Holmes, *Collected Legal Papers* 290 (1920).

reasonable limitations on the scope of the states' power to restrict individual property rights for over 65 years without any demonstrable impairment of the states' basic ability to regulate in the public interest.²⁹ Neither before nor after 1921 has any state other than Pennsylvania ever found that protection of the public interest required coal owners to forfeit their coal property and attendant mining rights, which are the only meaningful incidents of coal ownership. Moreover, on an issue as fundamental as what constitutes a "taking" of property, basic fairness dictates that private parties should be able to rely upon settled principles and precedents of this Court in attempting to order their primary commercial relationships. In reliance upon *Pennsylvania Coal*, petitioners and others have made and implemented plans for mining millions of tons of coal in Western Pennsylvania.

2. The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." The language of the Clause clearly can be read to impose constitutional limits on the exercise by the states of both eminent domain and police powers. Nothing in the language suggests that the framers intended this provision to be limited to cases concerning eminent domain authority. As one commentator has

²⁹ Probably the best evidence that *Pennsylvania Coal* has not created any severe problems for government regulation is the fact that the United States filed a brief in this Court earlier this Term expressly approving the basic approach of *Pennsylvania Coal*. Brief for the United States as *amicus curiae* at 18-19, *MacDonald, Sommer & Frates v. County of Yolo*, No. 84-2015. Moreover, in the same case, the State and Local Legal Center filed a brief on behalf of eight national organizations, representing state and local governmental units, which conceded that in a case such as this one where invalidation is the requested remedy "the concept of taking may be useful as a short hand for the conclusion that regulation has intruded too far on protected rights." Brief of the National Association of Counties, *et al.* at 20, *MacDonald, Sommer & Frates v. County of Yolo*. Obviously, if the governments which are most directly affected by the *Pennsylvania Coal* rule have not heretofore criticized it as creating a burden, it seems clear that the restriction is reasonable and does not warrant reconsideration or modification.

aptly explained, "A taking is that which takes, whether by condemnation, physical invasion, regulation or any other stringent exercise of state power."³⁰

Reading the Takings Clause as a restriction on the exercise of all government regulation affecting property rights is also fully consistent with the basic respect for property rights which the framers of the Constitution and the Bill of Rights held. One authority has recently argued that "[i]t is very clear that the founders shared Locke's and Blackstone's affection for private property."³¹ As Madison explained, the requirement of just compensation evidenced "pride[] . . . in maintaining the inviolability of property." *Property*, Nat'l Gazette, Mar. 27, 1792, in 14 J. Madison, *The Papers of James Madison* 267 (C. Hobson & R. Rutland eds., 1979). Thus, although the evidence concerning the framers' intent is limited,

³⁰ Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L. J. 15, 50 (1983). See Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 694, 711 (1985) ("a broader reading would not do violence to the text.") (hereafter cited as "Yale Note").

The constitutional history surrounding the Takings Clause, although meager, does nothing to undermine the idea that the prohibition extends to all governmental takings, regardless of the particular power used to effect the taking of property. The original version of the Clause as proposed by James Madison provided: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation." Speech Proposing the Bill of Rights (June 8, 1789), in 12 J. Madison, *The Papers of James Madison* 201 (R. Rutland ed. 1977). This version certainly could be read to refer more clearly to the physical taking of property via the power of eminent domain than does the language actually adopted. Yale Note 711 n.95. No evidence appears in the debate, however, concerning why or how the broader language was substituted, but the change clearly reinforces the basic argument that the Takings Clause limits all governmental takings, including those effected pursuant to the police powers. See Yale Note, *supra* at 711 n.95.

³¹ R. Epstein, *Takings: Private Property and the Power of Eminent Domain* 29 (1985).

what there is supports the Court's statement in *Pennsylvania Coal* that excessive regulation of private property can constitute an unconstitutional taking of that property, which should be enjoined absent any provision for just compensation.

3. This history provides ample support for the long line of decisions of this Court, both before and after *Pennsylvania Coal*, which have embraced the principle that the Takings Clause is more than a limitation on the actual exercise of eminent domain power. For instance, the Court in *United States v. Causby*, 328 U.S. 256 (1946), held that military overflights constituted a temporary taking of the plaintiff's chicken farm. In so doing, the Court assumed that the Takings Clause must be a limitation on the federal government's police powers. Otherwise, the absence of any effort by the United States formally to condemn the property, would have ended the Court's analysis.³²

Similarly in *Pumpelly v. Green Bay & Mississippi Canal Co.* 80 U.S. (13 Wall.) 166, 177 (1872), this Court held that the intentional flooding of an individual's land by the state effected a taking of that land requiring that compensation be paid by the state. In so holding, the Court rejected giving the Takings Clause a technical reading. The Court's cogent statement of the governing principles warrants repeating:

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the

³² The cases involving the government's physical invasion of the individual's property cannot be distinguished from any other takings in terms of the language of the Fifth Amendment; both involve a de facto taking and restrict the exercise of the government's police power and not its eminent domain authority. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 429.

common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not taken for the public use.

That logic is as powerful today as it was over 100 years ago. This Court already has held that restrictions identical to those now embodied in the latter-day successor to the Kohler Act are excessive. Accordingly, the statute and regulation should be declared unconstitutional.

C. The Court Of Appeals Improperly Analyzed Both The State's Interest And Petitioners' Property Rights In Its Use Of This Court's Decisions Other Than *Pennsylvania Coal*.

Without doubt, the simplest way for the Court to decide this case is to follow *stare decisis* and hold that Section 4 of the Bituminous Coal Act and the Kohler Act are identical for purposes of a "takings" analysis and therefore the former is unconstitutional for the reasons stated 65 years ago in *Pennsylvania Coal*. The court of appeals argued, however, that under the Takings Clause it could balance the State's interest in taking petitioners' property against the magnitude of the deprivation; that it could disregard petitioners' right to the support estate as a legitimate, separate property interest; and that it could ignore petitioners' reasonable investment-backed expectations. Analysis of this Court's more recent cases in fact shows that today, as in 1922, the Constitution respects state-recognized property rights and the reasonable expectations those rights create, regardless of how important the state's interest is in "taking" the property. The State's attempt to take petitioners' property and contract rights without any compensation in the name of public economic development thus clearly violates the Takings Clause.

1. In its most comprehensive recent treatment of the Takings Clause, this Court defined a regulatory taking in terms of three factors—diminution of the property's economic value, interference with distinct investment-backed expectations and the character of the government's action in the sense of whether there has been a physical invasion of the property.³³ *Penn Central Transportation Co. v. New York City*, 438 U.S. at 124. See *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). All three of these factors relate only to the impact of the state's regulation on the individual's property interest. Nowhere in that inquiry did the Court indicate that a taking depended upon the importance of the state's interest. See *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1332 (9th Cir. 1977) (state must pay for taking even if exercising legitimate police power).

Whenever governments act, they act in the public interest. No Takings Clause decision of this Court has ever ascribed a greater weight for these purposes to one public interest over another. Surely, if the interest of the State of Pennsylvania in protecting the personal safety of its citizens is insufficient to justify prohibiting the owners of coal to mine it, neither is an interest in promoting land development or preventing erosion of the tax base. In either case, government imposes on one group of its citizens costs which should be borne by all.

Moreover, it makes no sense to say, as the court of appeals appears to (Pet. App. 17a-18a), that a severe deprivation of an individual's property without compensation can be justified so long as the state's action furthers a legitimate state interest. That is precisely the inquiry used to determine whether the taking is for a

³³ The character of the government's action does not include an analysis of the magnitude of the state's interest. Instead, it refers only to whether the state is physically invading the individual's property, which constitutes a taking without any further inquiry. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

public purpose. As this Court stated in *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984), quoting, *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321, 2329 (1984), the "scope of the 'public use' requirement of the Takings Clause is 'coterminous with the scope of a sovereign's police power.'" Thus, under the logic of the court of appeals' interpretation, if the state satisfies the public purpose requirement, it would never be obligated to pay for any property it "takes" or be prohibited from taking any property it wants without providing any method of compensation. In other words, the "balancing test" employed by the court of appeals would viscerate the protections of the Takings Clause.

In our view, therefore, the proper approach is to analyze the nature of the government's action in relation to its impact upon the individual's property rights. If the conduct can properly be characterized as a "taking," such as here where private property and contract rights are being committed to a public purpose, then, under the plain meaning of the Takings Clause, the state is left with two options: pay for the property or stop restricting its use.

Even assuming, as we do not, that the Takings Clause does permit the Court to take into account the magnitude or nature of the state's interest as a basis for permitting uncompensated takings of private property, it is clear that some form of judicial scrutiny, more demanding than the rational relationship test applied by the court of appeals, should be required. Otherwise, there would be no reason to have a specific constitutional guaranty which extends to this type of taking. At a minimum, therefore, the state should be required to tailor its legislation carefully toward the ends it seeks to accomplish without unduly interfering with the individual's legitimate property rights. Section 4, however, simply tramples petitioners' rights.³⁴

³⁴ It is ironic that at the time the Pennsylvania legislature enacted Section 4, it rejected an alternative adopted by the Pennsylvania

2. The other method the court of appeals employed to reject petitioners' taking claim was to define away petitioners' property rights. It did this in two ways. First, the court held that "[t]o focus upon the support estate separately . . . would serve little purpose." Pet. App. 15a. The court argued that the support estate was merely "one 'strand' in the [petitioners'] 'bundle' of rights." *Ibid.*, quoting, *Andrus v. Allard*, 444 U.S. at 65. See also *Penn Central Transportation Co. v. New York City*, 438 U.S. at 130-131.

It is impossible to reconcile the court of appeals' treatment of the support estate with this Court's repeated holdings that property rights within the meaning of the Fifth Amendment's Takings Clause are defined by state law and that federal courts in a case such as this have no authority to disregard those definitions. See, e.g., *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2872 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *United States v. Causby*, 328 U.S. 256, 266 (1946).³⁵

Senate as an amendment to the Bituminous Coal Act, which would have allowed surface owners to purchase the support estate from coal operators. The amendment was adopted by the Senate in 1965 because of the obvious constitutional problem created by re-enacting the Kohler Act. The Senate-passed alternative explicitly would have authorized surface owners to reshift the risk of subsidence to the mine operator by purchasing coal support. *Legislative Journal—Senate* 1473-1474 (Dec. 13, 1965); *Legislative Journal—House* 2946-2947 (Dec. 20, 1965). Moreover, it permitted the state to arbitrate the value of the purchased support estate, assuming that the parties could not reach agreement. *Id.* at 2947. This alternative, obviously would have been much less destructive of petitioners' property rights. Instead of adopting this program, however, the state legislature disregarded the Constitution and *Pennsylvania Coal* and simply authorized the DER to impose the 50% requirement for surface structure support. See pages 5-7 and notes 6-13, *supra*.

³⁵ Nor is there any basis for concluding that, because petitioners' right to the support estate could be regarded as less than a fee simple interest in the land, that interest is "something less than property." *United States v. Security Industrial Bank*, 459 U.S. 70,

The decisions of this Court, relied upon by the court of appeals, are easily distinguishable. In a case such as *Andrus*, the government merely prohibited a specific use for the property. That the use might be recognized as a separate right as a matter of state law does not convert the restriction of that use into a taking of property within the meaning of the Fifth Amendment. In this case, petitioners have expressly purchased the separate property right and the coal itself is of no value without the ability to rely upon this state-recognized right. As the Court stated in *Pennsylvania Coal*, "For practical purposes, the right to coal consists in the right to mine it." 260 U.S. at 414, quoting *Commonwealth ex rel. Keator v. Clearview Coal Co.*, 256 Pa. 328, 331, 100 A. 820 (1917). Thus, the prohibition in this case is not of a single use of property; it is a physical restriction that abolishes a valuable estate in land. Accordingly, the court of appeals erred in ignoring petitioners' property right in the support estate.³⁶

Even if the court of appeals could properly refuse to respect the State's definition of the support estate as a property right, it committed a separate error in its analysis of petitioners' reasonable investment-backed expectations, which this Court has repeatedly emphasized is a critical element in finding a taking. *Penn Central Trans-*

76 (1982). See *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (security interest taken); *Armstrong v. United States*, 364 U.S. 40 (1960) (materialman's lien taken).

³⁶ The facts of this case present an additional basis for finding that Pennsylvania has taken "property" from petitioners. It is well settled that a legislative destruction of contract rights to suit a public purpose can be a taking requiring compensation. See, e.g., *Contributors to Pennsylvania Hospital v. City of Philadelphia*, 245 U.S. 20 (1917); *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685 (1897). Thus, whether the right to the supporting coal is regarded as an estate in land or as a contract right should make little difference. In either case, the State is destroying completely the value of that right to serve its economic purposes and should either compensate petitioners or withdraw its restriction.

portation Co. v. New York City, 438 U.S. at 124; *Kaiser Aetna v. United States*, 444 U.S. at 179.

In language that is strikingly similar to the erroneous reasoning of the Pennsylvania Supreme Court in *Pennsylvania Coal*, the court of appeals held that petitioners' expectations "are always circumscribed by the limitations on its use that may be imposed by the state in the public interest." Pet. App. 17a.³⁷ The court's statement is both factually inaccurate, and its legal reasoning is plainly wrong.

Petitioners present the classic case of reasonable investment-backed expectations. Coal operators like petitioners in Pennsylvania purchased the support estate for the purpose of maximizing their flexibility for the future in employing mining techniques, such as longwall and other full extraction mining methods, and in ensuring maximum coal extractions consistent with the safety of their employees. To these ends, petitioners and other coal operators purchased a separate property right in order to shift the risk of subsidence damage from themselves to the surface owners. Indeed, these purchases were indirectly encouraged by Pennsylvania because of its recognition of a distinct property right available to allocate that risk. Compare *Kaiser Aetna v. United States*, 444 U.S. at 179. Thus, if petitioners' investment-backed expectations are entitled to no protection against Pennsylvania's restrictions, then that concept has no meaning. In *Penn Central*, the Court concluded that "the law does not interfere with what must be regarded as Penn Central's primary expectation. . . ." 438 U.S. at 136. That "primary expectation" was the continued "present uses of the terminal." *Ibid.* Here, the primary

³⁷ Compare Transcript of Record at 72:

[T]he state, under its police power, may lawfully impose such restrictions upon private rights as . . . may be deemed expedient; for all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. . . .

use of the coal is its only use. If it cannot be mined by petitioners, then it is useless to them.

But this Court's decision in *Kaiser Aetna* clearly requires these interests to be protected. In that case, the Court held that the federal government had "taken" a developer's marina by ordering public access to it after the developer had invested in dredging a pond to connect it with a navigable waterway of the United States. The Court held that the federal government could not deprive the developer of the value of his investment without compensating him for the loss. Under the reasoning of the Third Circuit in this case, the developer would not have had any legitimate expectation concerning the use of the marina in light of the federal government's underlying right of navigation, and therefore, there would not have been a taking. The holding of *Kaiser Aetna* thus undermines completely the court of appeals' attempt to demean petitioners' investment in the right to the support estate which they hold with respect to coal lands throughout Western Pennsylvania.

In sum, Pennsylvania has deprived petitioners of access to millions of tons of coal. That action constitutes a clear "taking" of property for a public purpose within the meaning of the Takings Clause. Because no provision is made for compensating petitioners for their loss, the State should be enjoined from enforcing Section 4 of the Bituminous Coal Act and its implementing regulation.

II. THE COURT OF APPEALS APPLIED THE WRONG STANDARD OF CONTRACT CLAUSE REVIEW TO SECTION 6 OF THE BITUMINOUS COAL ACT, WHICH UNCONSTITUTIONALLY IMPAIRS THE OBLIGATIONS OF CONTRACT

The court of appeals effectively repealed the Contract Clause as it applies to state laws severely impairing the contracts of private parties. U.S. Const. Art. I, § 10, cl. 1 ("no State shall . . . pass any . . . Law impairing the Obligation of contracts"). Because the State was not

a party to the contracts in this case, the Third Circuit concluded that it should “defer to the legislative judgment as to the reasonableness of the particular measure, as is customary in reviewing economic and social regulations in other contexts.” (Pet. App., 19a; emphasis added.) The court only inquired whether Section 6 was rationally related to a legitimate governmental purpose, and it thus applied a deferential standard of review identical to the standard of review which governs substantive challenges to state economic regulation brought under the Due Process Clause of the 14th Amendment. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963) (highly deferential, substantive due process standard of review). It gave no weight to executed contract rights.

In so doing, the court of appeals committed fundamental constitutional error. When, as here, a state severely impairs a contract between private parties, the proper Contract Clause standard of review is the “reasonable and necessary” test developed in the seminal case of *Home Bldg & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934) (“*Blaisdell*”) and reaffirmed recently in the leading contemporary case, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (“*Spannaus*”). See also, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977) (“*U.S. Trust*”) (“reasonable and necessary” test applies to private contracts). This test is clearly more stringent than the deferential rational-relationship, substantive due process test for reviewing state economic regulation. See, e.g., *Spannaus*, 438 U.S. at 242-244 (Contract Clause not rendered a “dead letter” by the Due Process Clause). Under the “reasonable and necessary” Contract Clause test, Section 6 of the Bituminous Coal Act cannot pass constitutional muster.

A. Section 6 Does Not Just Severely Impair But, In Fact, Destroys the Obligations of Contract.

The issue of the proper Contract Clause standard of review is clearly and sharply presented because it was conceded below that the obligations of the contracts at

issue were severely impaired by Section 6. The surface land owners, by express contract, sold the mineral and support estates to petitioners and released the coal companies from liability for any non-intentional harm to surface structures caused by mine subsidence.³⁸ See pp. 3-4, *supra*. Section 6 provides that, if mining operations cause “damage to structures set forth in Section 4” of the Act, then the mine operator must either repair all damage to such structures or pay “all claims” arising from such damage. Pet. App. 50a-56a. This statutory provision nullifies, not just modifies, an important contractual term.³⁹

Accordingly, Section 6 severely “impairs” the obligations of the contracts between petitioners and the surface owners in a constitutional sense, as the courts below acknowledged. (Pet. App. 19a, 30a).⁴⁰ Indeed, the complete and irrevocable nullification of substantive contract rights places Section 6’s impairment at the core of the

³⁸ *Kellert v. Rochester & Pittsburgh Coal & Iron Co.*, 226 Pa. 27, 74 A. 789, 790-91 (1909); see *Atherton v. Clearview Coal Co.*, 267 Pa. 425, 110 A. 298, 300 (1920).

³⁹ See pp. 8-9, *supra*. Petitioners obtained such express contractual releases for injury to the surface overlying virtually all of their mining operations. See J.A. 93-94, 267-269, 280-281. It is estimated that approximately 90 percent of petitioners’ mining operations covered by Section 6 of the Act involved such express contractual releases from the owners of the surface estate. J.A. 93-94; see p. 3-4 & note 5, *supra*.

⁴⁰ Section 6’s impairment clearly satisfies the legal standards established by this Court for determining when an impairment is “substantial,” thus requiring justification. Not only does this Section (i) substantially alter important contractual terms by completely reversing the obligation to bear the cost of subsidence damage to the surface land, *U.S. Trust Co.*, 431 U.S. at 19-20; *Spannaus*, 438 U.S. at 240, but also it (ii) clearly upsets the legitimate and long-standing expectations of the parties to the contracts as to who would bear such costs. *U.S. Trust*, 431 U.S. at 19-21; *Spannaus*, 438 U.S. at 246-47; *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413-416 (1983).

concerns which led to inclusion of the Contract Clause in Article I.⁴¹

B. The Court of Appeals Demonstrably Failed to Use the "Reasonable and Necessary" Contract Clause Standard of Review Which This Court Has Applied to Laws Severely Impairing Private Contracts.

Although by its terms absolute, the Contract Clause has not been so interpreted by this Court. *Blaisdell*, 290 U.S. at 428. Instead, during more than 180 years of Contract Clause adjudication, this Court has sought to develop doctrines⁴² which reconcile the fundamental tension at the core of the Clause between the reliance interests of the parties to a contract and the interests of a state in exercising its sovereign powers in light of subsequent circumstances unforeseen at the time contracts were executed. *U.S. Trust*, 431 U.S. at 21, 32; *Energy Reserves*, 459 U.S. at 410; *Blaisdell*, 290 U.S. at 439 (neither contract nor police power interests can destroy the other, but "must be construed in harmony with each other"). But, in resolving that tension, this Court clearly has imposed limitations beyond a mere rational relation-

⁴¹ The chief purpose of the Contract Clause was to prevent the invasion of private contractual obligations by state laws. *Blaisdell*, 290 U.S. at 247. This case is at the core of the Contract Clause's concerns because a state law has impaired an executed private contract, not a state charter or land grant; has directly affected substantive contract rights, not remedies for enforcing those rights; and has completely destroyed those substantive rights, rather than modified or altered them. See *id.*, 290 U.S. at 427-434, 453-465 (summarizing history of Contract Clause). See generally, D. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789-1888* 127-159, 209-222 (1985); B. Wright, *The Contract Clause of the Constitution* 3-16 (1938).

⁴² See, e.g., *Pennsylvania College Cases*, 80 U.S. (13 Wall) 190, 218 (1872) (states may expressly reserve right to change their mind in contracts); *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 543 (1837) (to avoid scrutiny under clause, contracts are to be construed in favor of state); *Spannaus*, 438 U.S. at 244-45 (only substantial impairments require justification).

ship test, even when the state is exercising "its otherwise legitimate police power," *Spannaus*, 438 U.S. at 242. To do otherwise would be to give no weight to an explicit and strongly worded constitutional provision; indeed, it would be to read that clause out of the Constitution.

In *Spannaus*, this Court stated the fundamental principle for resolving the private-public tension, 438 U.S. at 245 (emphasis supplied; footnote omitted):

The severity of the impairment [of private contracts] measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation.

See also *Energy Reserves*, 459 U.S. at 411 (quoting *Spannaus* principle with approval); *U.S. Trust*, 431 U.S. at 27 (extent of impairment important factor). When, as here, there is not just severe impairment but indeed complete destruction of substantive contract rights, then the full "reasonable and necessary" test developed by this Court in *Blaisdell*, and reaffirmed and augmented in *U.S. Trust* and *Spannaus*, should be applied to determine whether an impairing state law survives Contract Clause scrutiny. See *U.S. Trust*, 431 U.S. at 25 (applicability of full test to impairment of private contracts). The court of appeals never even considered the fundamental principle of *Spannaus* that the greater the impairment the higher the level of judicial scrutiny, and it thus failed to apply the elements of the "reasonable and necessary" test in evaluating Section 6.

1. *Contract Clause "Reasonableness."* In defining "reasonableness" in a Contract Clause sense, the Court in *Blaisdell* did not rest on a mere rational relationship between legislative ends and the means chosen in upholding a mortgage moratorium law. Instead it explained that the law's adjustment of the parties' contract rights and responsibilities could only be sustained "upon reasonable conditions." 290 U.S. at 445. See also *Spannaus*,

438 U.S. at 242. Under the decisions of this Court, there are two dimensions of the "reasonable conditions" requirement which a state must satisfy.

First, to justify upsetting the parties' contract-based reliance expectations, the state must show that legislation impairing private contracts was designed to address significant problems of public policy not foreseen when the contracts were executed. *Spannaus*, 438 U.S. at 246-47, 250; *U.S. Trust*, 431 U.S. at 31-32 & n.30; *Blaisdell*, 290 U.S. at 439 (noting need of state to respond to "extraordinary conditions"). Although a state must have latitude to exercise its police power, it should be allowed to alter contracts and to upset reliance interests only when it can make a reasonable demonstration that conditions had changed in significant and unforeseen ways from the time when the contracts were executed. Otherwise, the settled expectations of the contracting parties have no protection against whimsical changes in state law.⁴³ The court of appeals erred in this case because it never asked whether the state law destroying contractual rights and shifting the costs of subsidence damage from surface owners to mine owners was responding to a problem unforeseen at the time the contracts were executed. See *U.S. Trust*, 431 U.S. at 32 (Burger, C.J., concurring).

Second, even if the state shows significant, unforeseen developments, it must further demonstrate that an impairing law is "reasonable in light of the [changed] circumstances." *U.S. Trust*, 431 U.S. at 29. The criteria articulated in *Blaisdell*, and reaffirmed and refined in *Spannaus*, define "reasonableness," for purposes of Contract Clause analysis; they are clearly more exacting than the deferential "rationality" standard appropriate in due

⁴³ For example, in *El Paso v. Simmons*, 379 U.S. 497, 515-516 (1965), this Court placed heavy emphasis on "developments hardly to be expected or foreseen" at the time the contracts at issue were executed in upholding a Texas statute modifying the right to reinstate ownership of lands forfeited by nonpayment of interest. See also *U.S. Trust*, 431 U.S. at 19 n.17.

process adjudication. *Spannaus*, 438 U.S. at 242-245.⁴⁴ In particular, an impairing state law must be evaluated to determine (a) if it was enacted to deal with a broad, generalized economic or social problem, and it is especially important if that problem rises to the level of an economic emergency;⁴⁵ (b) if it was enacted to protect a broad societal interest rather than a narrow class;⁴⁶ (c) if the state law operated in an area already subject to state regulation at the time the contractual obligations were undertaken;⁴⁷ and (d) if it was limited to the duration of the problem, rather than effecting a permanent change in contractual relations.⁴⁸ In upholding Section 6, the court of appeals did not even refer to the "reasonableness" criteria established in *Blaisdell* and *Spannaus*.

2. *Contract Clause "Necessity."* As utilized in *U.S. Trust*, 431 U.S. at 30, the "necessity" test asks whether there was an alternative means of achieving the state's goals which would have been less drastic and more moderate. Although the "less drastic alternative" language of *U.S. Trust* was stated in a contemporary Court idiom, the judicial inquiry into whether the state has properly tailored its law to the problems it was designed to meet has unambiguous origins in previous decisions relating to both public and private contracts.

In *Blaisdell*, the Court inquired whether the impairing law was "appropriate to" the problem it was designed

⁴⁴ *Spannaus* stated: "The *Blaisdell* opinion thus clearly implied that if the . . . [state law] had not possessed the characteristics attributed to it by the Court, it would have been invalid. . . ." 438 U.S. at 242; *U.S. Trust*, 431 U.S. at 22 n.19 (*Blaisdell* criteria, limiting states' power to alter contracts, "have since been subsumed in the overall determination of reasonableness").

⁴⁵ *Blaisdell*, 290 U.S. at 444; *Spannaus*, 438 U.S. at 250.

⁴⁶ *Blaisdell*, 290 U.S. at 444-445; *Spannaus*, 438 U.S. at 249.

⁴⁷ *Spannaus*, 438 U.S. at 242, n.13; *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940); *Energy Reserves*, 459 U.S. at 413-415.

⁴⁸ *Blaisdell*, 290 U.S. at 442-443; *Spannaus*, 438 U.S. at 250.

to solve and emphasized that the mortgage moratorium "has regard for the interest of mortgagees as well as the interest of mortgagors." 290 U.S. at 438, 446. In *Worthen Co. v. Thomas*, 292 U.S. 426, 431 (1934), the Court following the *Blaisdell* approach, clearly used the equivalent of a less drastic means analysis in striking down a law unconditionally exempting the proceeds of life insurance policies from seizure under judicial process. In *Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60 (1935), a state law similar to the one sustained in *Blaisdell* was struck down because it was more extreme and less moderate; the security of a mortgage bondholder, wrote Justice Cardozo for the Court, cannot be severely diminished "without moderation or reason or in a spirit of oppression" or with "studied indifference to the interest of creditors." As he stated simply, the invocation of the "public welfare" is no "excuse."⁴⁹

In short, when contract rights have been severely impaired or destroyed, the presumption accorded state legislation does not apply, *Spannaus*, 438 U.S. at 247, and the "necessary" test asks whether the state could have fairly balanced the competing private and public interests in a way which would have less severely affected substantive contract rights. Such an inquiry is clearly warranted given the profound tension in Contract Clause adjudication between contractual expectations protected by an express constitutional provision and the states' responsibility to meet the felt needs of the time. Once again, the court of appeals committed a fundamental error by completely ignoring the requirement of this Court and

⁴⁹ See *id.*, 295 U.S. at 60, 62-63 (need for state to use "restraint" and to show law is "necessary" in sense of balancing state and private interests). In *Spannaus*, this Court held that the "severe disruption of contractual expectations" was "not necessary to meet an important general social problem," and was not "precisely" designed to address the problem at hand. 438 U.S. at 244, 247. See also *City of El Paso*, 379 U.S. at 515-16 (Texas statute "necessary" to deal with problem).

by thus failing to inquire into the "necessity" or "appropriateness" of Section 6.

3. *The Effect of Energy Reserves and U.S. Trust*. In applying a deferential, rational relationship test to assess the validity of the impairing state law, the court of appeals erroneously relied on dicta from *U.S. Trust* and on this Court's decision in *Energy Reserves*. Pet. App. 19a-20a. It read those decisions as requiring a reviewing court to give no weight to contract rights and to defer to legislative judgments when state laws impair contracts between private parties, as opposed to laws impairing contracts to which the state itself is a party. But the court of appeals' reliance on those two decisions is misplaced. (Pet. App. 19a-20a.)

First, this Court in *Energy Reserves* did not purport in any way to overrule or modify the "reasonable and necessary" test of *Blaisdell-Spannaus*.⁵⁰ Moreover, the Court did not need to reach the issue of the nature of the ultimate Contract Clause test in *Energy Reserves* because its fundamental—and wholly dispositive—holding under the Clause was that there was no impairment of contract in a constitutional sense. *Id.* at 413-416. To the extent this Court reached the question of whether the state law could be justified under the Contract Clause standard of review, *Energy Reserves* is sharply different from this case—and from *Spannaus*—because the impairment in *Energy Reserves* was, at most, minimal, not substantial

⁵⁰ Indeed, it cited both cases with approval, 459 U.S. at 410-412, and repeated the fundamental modern principle from *Spannaus* that "the severity of the impairment [of private contracts] is said to increase the level of scrutiny to which the legislation will be subjected." *Id.* at 411. Nor did the Court modify *Spannaus*' unexceptionable conclusion that the Contract Clause, when applied to severe impairments of private contracts, was not as deferential to state law as the Due Process Clause. See also *National Railroad Passenger Corporation v. Atchison, T.&S.F. Ry.*, 105 S. Ct. 1441, 1455 n.25 (1985) (Contract Clause and the Due Process Clause standards of review are different; "less searching" inquiry under Due Process Clause).

(as in *Spannaus*) or total (as in this case), thus triggering a minimal, not exacting, level of judicial scrutiny.⁵¹

Second, *U.S. Trust* also provides no support for the court of appeals' approach. Relying on *Blaisdell*, *U.S. Trust* explicitly stated that courts are to apply a "reasonable and necessary" test to state laws impairing private contracts.⁵² More importantly, *U.S. Trust* was decided a year before *Spannaus*. Obviously, general comments in *U.S. Trust* (which involved a state contract), or in other Contract Clause cases decided after *Blaisdell* and before *Spannaus*, do not undermine the basic standard of review in *Spannaus* for evaluating laws that severely impair private contracts. And that approach was to reach back to *Blaisdell* for the fundamental constitutional limitations which a court must apply. 438 U.S. 244 (contract clause imposes limits on valid exercise of police power that "effects substantial modifications of private contracts"). See pp. 36-41 *supra*.

Although the more than 40 Contract Clause cases decided by this court between *Blaisdell* and *Spannaus* sometimes use broad dicta to describe the states' need to meet important social or economic problems, no case of

⁵¹ In its discussion of the justification for a minimally impairing (if that) state law, this Court in *Energy Reserves* emphasized two factors not present in this case. The state law was part of an *extensive federal and state regulatory scheme* affecting the price of natural gas, and the state statute was an attempt to harmonize intra-state pricing with recent changes in federal law affecting interstate pricing. *Energy Reserves*, 459 U.S. at 418. Cf. *Veiz v. Sixth Ward Bldg. & Loan*, 310 U.S. 32, 37-38 (1940) (withdrawal rights from savings and loan associations governed for decades by statute). Perhaps more importantly, the state law was a temporary measure which would expire in five years, and which did not therefore work the kind of permanent damage to substantive contract rights present in this case. *Energy Reserves*, 459 U.S. at 407, 418-419.

⁵² See 431 U.S. at 22 (laws impairing private contracts must be "upon reasonable conditions and of a character appropriate to the public purpose"), 23 (courts look at "the necessity and reasonableness" of a law), 25 ("reasonable and necessary" test applies to impairment of private contracts).

the modern, *post-Blaisdell* era sanctions the complete destruction of substantive contracts rights presented by this case. At least eight *post-Blaisdell* cases have struck down as unjustified statutes impairing contracts, and four of those eight involved contracts between private parties.⁵³ Seven *post-Blaisdell* cases upheld laws which substantially impaired contracts in a constitutional sense as justified under a Contract Clause standard of review. But these decisions used a standard of review similar in approach, if not always in name, to the reasonable and necessary test because the states had carefully balanced private contract rights and the public interest. The impairing state laws were valid because (i) they temporarily altered contract rights, or (ii) they altered remedies, or (iii) they limited a party to what it could reasonably expect, or (iv) they benefited the party whose contract was allegedly impaired; they did not completely destroy core substantive rights.⁵⁴ In any event, while not over-

⁵³ See *Worthen v. Thomas*, 292 U.S. 426 (1934) (unrestricted exemption of insurance proceeds from judgment creditor's lien); *Triegle v. Acme Homestead Ass'n*, 297 U.S. 189 (1936) (modification of the withdrawal rights of building and loan association stockholders); *International Steel & Iron Co. v. National Surety Co.*, 297 U.S. 189 (1936) (nullification of surety bond); and *Spannaus*, *supra* (modification of employer's pension fund obligation). Four other *post-Blaisdell* cases invalidated state laws impairing contracts to which the state was a party: *Worthen v. Kavanaugh*, 295 U.S. 56 (1935) (modification of municipal bondholder's remedy for enforcing claim against security that effectively nullified the value of the security); *Indiana v. Brand*, 303 U.S. 95 (1938) (repeal of statute giving public school teachers indefinite tenure); *Wood v. Lovett*, 313 U.S. 362 (1941) (repeal of statute foreclosing challenge to title of property acquired from the state); *U.S. Trust*, *supra* (repeal of statutory bond security covenant).

⁵⁴ *City of El Paso*, 379 U.S. at 515 (five year limit on reinstatement of forfeited public lands restricted "party to those gains reasonably to be expected from the contract"); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945) (after exhaustive study, temporary extension of mortgage moratorium and attempt to accommodate interests of mortgagees); *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942) (restructuring debt of insolvent municipality to the clear benefit of all creditors);

ruling any post-*Blaisdell* cases, this Court in *Spannaus* clearly recognized that the Contract Clause had meaning separate and distinct from the Due Process Clause and required courts to balance contract rights against the states' interest in exercising the police power, a balance which varies with the severity of the impairment.

Finally, nothing in the constitutional text, in its history or in logic support the court of appeals' approach. The absolute wording of the Clause, while not to be taken any more literally than the absolute wording of the First Amendment, is to be given significance and weight; it cannot be assumed, as the court of appeals implicitly does, that an explicit provision of the Constitution is rendered a nullity by another provision, the Due Process Clause, and that protected contract rights have no weight.⁵⁵ Indeed, the constitutional debates, while hardly a complete guide to Contract Clause interpretation, *Blaisdell*, 290 U.S. at 426, establish beyond question that the primary evil against which the Clause was aimed was

Gelfert v. National City Bank of N.Y., 313 U.S. 331 (1941) (modification of remedy, limiting secured creditor's opportunity to recover more than was due under the contract); *Veiz v. Sixth Ward Bldg & Loan Ass'n*, 310 U.S. 32 (1940) (modification of the statutory withdrawal rights of building and loan association stockholders to avoid insolvency); *Honeyman v. Jacobs*, 306 U.S. 539 (1939) (modification of remedy, limiting secured creditor's opportunity to recover more than was due under the contract); *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124 (1937) (same).

Most of the post-*Blaisdell* Contract Clause cases contain no discussion of the adequacy of the state's justification, because there was no impairment in a constitutional sense or no contract. See, e.g., *Neblett v. Carpenter*, 305 U.S. 297 (1938) (no impairment); *Dodge v. Board of Education*, 302 U.S. 74 (1937) (no contract).

⁵⁵ Even if provisions of the Constitution conflict, it is the duty of the Court "to construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 393 (1821) (Marshall, C.J.).

destruction of *private* contract rights by subsequently enacted state laws.⁵⁶ And it is illogical to maintain that a strict standard of review should be applied to a state law *modifying* a state contract, but a wholly deferential standard of review should be applied to a state law *destroying* a private contract. In sum, the sound approach is to subject state laws that severely impair private contracts to the reasonable and necessary test derived from a unique, express constitutional provision.

C. Section 6 Is Invalid Under the Reasonable and Necessary Test.

The legislative history of Section 6 of the Bituminous Coal Act consists primarily of a single page of legislative findings recited at Section 3.⁵⁷ The minimal effort by the State of Pennsylvania to justify the destruction of substantive contract rights clearly does not satisfy the "reasonable and necessary" test, primarily because the State gave *no* weight to the vested private contract rights protected by the Contract Clause.

1. *Section 6 Is Not Reasonable in a Contract Clause Sense.* The destruction of contract rights and responsibilities by Section 6 was clearly not based upon "reasonable conditions." See pp. 37-39, *supra*. First, the legislative findings of Section 3 fail to show that the contracts putting the cost of subsidence damage on the surface owners, rather than the mine owners, had created significant problems of public policy unforeseen when the contracts were executed. See p. 38, *supra*. Such a showing would have been difficult because the issue of who should bear such costs had been discussed in Pennsylvania since underground mining began in the 19th Century. Indeed, the very existence of the contracts shows that the

⁵⁶ See, e.g., D. Currie, *The Constitution in the Supreme Court*, *supra*, 135 & nn. 76-78; B. Wright, *The Contract Clause of the Constitution*, *supra*, at 8-16. See also *U.S. Trust*, 431 U.S. at 45 (Brennan, J., dissenting).

⁵⁷ 52 Pa. Const. Stat. Ann. § 1406.3. See pp. 6-7 & notes 6-13, *supra*.

problem was not only foreseen, but resolved by the contracting parties. Section 6 simply rewrites the contracts to achieve a different resolution.

Second, the State also cannot show that Section 6 is "reasonable in light of changed circumstances" under the *Blaisdell-Spannaus* criteria. See pp. 38-39, *supra*. (a) The state has not shown that destroying contract rights and shifting the costs of subsidence damage to the mine operators was intended to address a broad, generalized economic or social problem, as noted immediately above. In fact, while the findings do discuss the problem of preventing damage, the legislative findings of Section 3 do not discuss explicitly the issue of who should bear the cost of subsidence damage once it occurs.⁵⁸ (b) Similarly, the legislative "findings" are completely silent on whether—or how—Section 6 protects a broad societal interest rather than a narrow class of surface land owners. (c) Section 6 demonstrably did not operate in an area subject to state regulation at the time the contractual obligations regarding the cost burden were undertaken, and the legislative findings do not even purport to state the contrary. (d) Section 6 is not of limited duration, but instead works a permanent destruction of substantive contract rights. Accordingly, when, as here, none of the *Blaisdell-Spannaus* heightened reasonableness criteria are satisfied, the state cannot satisfy the second aspect of the Contract Clause's "reasonable conditions" test.

2. *Section 6 Is Not Necessary in a Contract Clause Sense.* Section 6 also fails to pass Contract Clause

⁵⁸ As the district court found, the State's interest in enacting the Bituminous Coal Act was "to prevent subsidence damage, not to provide remedies after damage has been incurred." (Pet. App. 31a-32a; emphasis supplied.) The court of appeals cited to no legislative history or findings regarding the problem which Section 6 purported to solve. *Cf. Blaisdell*, 290 U.S. at 420-421 n.3 (citing to state legislative findings which directly address the particular problem requiring mortgage moratorium legislation).

muster because the legislature did not seriously consider—much less make any findings on—the question whether an alternative more carefully tailored to the problem of repairing subsidence damage existed, an alternative less destructive of contract rights. Strikingly, a less destructive, more appropriate alternative did exist at the time the Bituminous Coal Act was passed—an alternative that still exists today.

Since 1961, the state has administered an insurance program to defray the costs of mine subsidence damage for the owners of surface property in mining regions. Act of August 23, 1961, P.L. 1068, *as amended*, 52 Pa. Const. Stat. Ann. §§ 3201, *et seq.* (Purdon 1985). The program is called the Coal and Clay Mine Subsidence Insurance Fund and is administered by a state board which issues implementing regulations. 25 Pa. Admin. Code §§ 401.1 *et seq.* (Shephard's 1980). All surface structures are covered;⁵⁹ non-commercial surface landowners must pay relatively small annual premiums for coverage with a \$250 deductible; and the administrative board may not refuse coverage simply because a structure is in a high risk area.⁶⁰ As of this date, the Fund has written policies which would cover more than \$1.3 billion in claims of damage, with approximately half of that amount relating to bituminous coal areas covered by the Bituminous Coal Act. Since 1961, approxi-

⁵⁹ The non-commercial publicly used buildings and dwellings covered by Section 6 are also covered under the insurance program. Compare 52 Pa. Cons. Stat. Ann. § 1406.4 (coal Act) with 52 Pa. Cons. Stat. Ann. §§ 3212, 3213(a) and 25 Pa. Admin. Code §§ 401.1, 401.11 (insurance Act).

⁶⁰ A property owner may purchase insurance from \$5,000 to \$100,000 per structure. 25 Pa. Admin. Code § 401.11(c). The current premium for the maximum coverage, (\$100,000) is \$91.00, and a 25 percent surcharge may be added in areas with active mines. 26 Pa. Admin. Code § 401.13(c). See also 52 Pa. Cons. Stat. Ann. § 3212.

mately 900 claims have been paid out totaling about \$4.6 million.⁶¹

In sum, Section 6 of the Bituminous Coal Act was not "necessary" in a constitutional sense because, even if the State had more explicitly and concretely demonstrated that there was a broad, unforeseen societal problem about who should bear the cost of subsidence damage, the recent but previously established state fund spread the cost of paying for that damage through an insurance pooling mechanism. This established program, with its relatively low premiums, affords affected surface landowners a means of repairing subsidence damage to their structures without destroying petitioners' contract rights.

.

The tests established by this Court under the Contract Clause do not give substantive contract rights absolute protection. But these tests, based as they are on an express, strongly worded provision of the Constitution, do give weight to contract rights and require a state to provide careful, thoughtful justifications before it rides roughshod over private contracts. This the State of Pennsylvania has not done. To approve this state law and to disregard the limitations of the Contract Clause is to invite state legislatures to act with thoughtless haste in derogation of substantive contract rights.⁶²

Accordingly, this Court should hold that, insofar as it impairs petitioners' contracts with surface owners, Section 6 of the Bituminous Coal Act is invalid under the Contract Clause of the Constitution.

⁶¹ Coal and Clay Mine Insurance Board, County Report (Mar. 1986) (a copy of which is being lodged with the Clerk of this Court).

⁶² Compare *Faitoute Iron & Steel Co.*, 316 U.S. at 515 (approving "state intervention, carefully devised, worked out with scrupulous detail and with due regard to the interests of all creditors").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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May 23, 1986

RESPONDENT'S BRIEF

FILED

JUN 23 1986

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CLERK

No. 85-1088

IN THE
Supreme Court Of The United States

October Term, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner/Appellant,

7.

ALAN WOODS AND CARA WOODS,
Respondents/Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

The Appellant has stated the questions:

I. WHETHER ALABAMA CODE SECTION 12-22-72 (1975), WHICH IMPOSES A MANDATORY PENALTY OF TEN PERCENT OF THE AMOUNT OF JUDGMENT ON AN UNSUCCESSFUL DEFENDANT-APPELLANT, WHILE IMPOSING NO SIMILAR PENALTY ON PLAINTIFF-APPELLANTS, IS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

II. WHETHER THE STATUTORY AFFIRMANCE PENALTY IS A RULE OF PROCEDURE AND NOT APPLICABLE TO ACTIONS IN FEDERAL COURT.

We agree with this statement of the issues.

PARTIES TO THE PROCEEDING

We agree with the list of parties and affiliated or related parties as printed at page ii, Petition for Writ of Certiorari.

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 No. 85-1088

IN THE
Supreme Court Of The United States

October Term, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner/Appellant,

v.

ALAN WOODS AND CARA WOODS,
Respondents/Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES
 COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF APPELLEES

OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals, related to the substantive issues in the case, appears at 768 F.2d 1287 (11th Cir. 1985) and is printed at Appendix D of the Petition for Writ of Certiorari. The Order of the Eleventh Circuit denying Petitioner's motions for a stay of proceedings or in the alternative for oral argument is printed at Appendix M of the Joint Appendix. (J.A. 39) The Order of the Eleventh Circuit granting Respondents' motion for ten percent penalty assessment pursuant to Alabama statute is printed at Appendix A of the Petition for Writ of Certiorari. The Order of the Eleventh Circuit denying rehearing is printed at Appendix N of the Joint Appendix. (J.A. 40)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-1092

KEYSTONE BITUMINOUS COAL
ASSOCIATION, et al.

Petitioners,

v.

NICHOLAS DEBENEDICTIS, et al.

Respondents

BRIEF FOR RESPONDENTS

STATEMENT

1. In 1966, the Pennsylvania General Assembly responded to the devastating effects of coal mine-related subsidence by enacting the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, 1966 Pa. Laws (Special Session No. 1) 31, Pa. Stat. Ann. tit. 52,

§1406.1 et seq. (Purdon Supp. 1986) (Subsidence Act). The legislature found that existing regulations had failed to protect the citizens from "clear and present danger to [their] health, safety and welfare." Id. at §1406.3. The result was that land development had been impeded and the tax base threatened, all to the serious detriment of the Commonwealth's "economic future and well-being." Ibid. The legislature recognized also that the coal mining industry is "important to the economic welfare and growth of the Commonwealth." Ibid. The Act was thus designed to "harmonize" the protection of selected structures with the "continued growth and development of the bituminous coal industry." Ibid.

The Subsidence Act requires that coal mining be conducted in a manner which prevents subsidence damage to limited classes of structures in place on April 27,

1966 (the date on which the Act was passed).¹ Included are public buildings and noncommercial structures used by the public; dwellings; and cemeteries. 52 Pa. Stat. Ann. tit. 52, §1406.4 (Purdon Supp. 1986). Damage is permitted if the current owner consents and the damage is repaired or compensation is paid. Ibid. In order to prevent damage, coal mine operators are required either to leave 50% of the coal in pillars in support areas under protected structures; or to show that "[a]lternative measures, including full extraction techniques which result in planned and controlled subsidence" will be equally

¹For structures erected after passage of the Act it was envisioned that the combination of strict notice requirements, Pa. Stat. Ann. tit. 52, § 1406.14 (Purdon Supp. 1986), and the right of surface owners to purchase coal for support, id. at § 1406.15, would provide adequate protection.

effective. 25 Pa. Admin. Code §89.143(b)(3)². If protected structures nevertheless sustain subsidence damage, the mining company must repair the damage or compensate the owner for the damage. Pa. Stat. Ann. tit. 52, §1406.6 (Purdon Supp. 1986).

In 1977, Congress passed the Surface Mining Control and Reclamation Act, 91 Stat. 445, 30 U.S.C. §1201 et seq. Congress recognized, much like the Pennsylvania legislature had eleven

²State regulatory officials adopted the "50% rule" because it was their professional judgment that it is the most effective method to provide support which, in almost all cases, will last at least for the life of the structure. J. App. 89 The rule requires a support area only under protected structures calculated according to a formula prescribed in regulations. See 25 Pa. Admin. Code § 89.143(b)(3)(1) (reproduced in Pet. App. 63a, but numbered § 89.143 (b)).

years earlier, that mining had caused severe damage producing grave social, economic and environmental effects. 30 U.S.C. §1201. Of particular importance here, Congress included within the regulatory scheme control of the surface effects of underground mining, 30 U.S.C. §1266, and encouraged the States to assume primary regulatory control by submitting a program for approval by the Secretary of the Interior. 30 U.S.C. §1253.

Pennsylvania responded by developing a program which was approved by the federal authorities. 47 Fed. Reg. 33081 (July 30, 1982). As a part of its submission, Pennsylvania adopted regulations which expanded subsidence protection to include public buildings and noncommercial structures customarily used by the public, which were erected

after April 26, 1966; bodies of water in excess of 20 acre feet; significant sources of public water; and coal refuse areas.³ J.App. 87.

2. On December 16, 1982, petitioners, who are five coal companies and an association of coal mining companies (hereinafter collectively referred to as "the coal companies"), filed suit in the United States District Court for the Western District of Pennsylvania challenging certain features of Pennsylvania's subsidence control program. J. App. 1. Included

³It is not entirely clear whether the coal companies challenge in this Court only the statutory protections or the regulatory ones as well. They mention the expanded category of protection in their statement of the case (Pet. Br. 5), but in their argument pose their challenge to "Section 4 [of the Act] and its implementing regulation." Pet. Br. 15, 33. We are left to wonder which regulation they dispute.

were claims that the subsidence damage prevention requirements violated the Takings Clause and that the repair or compensation provisions violated the Contract Clause. J.App. 27-30.⁴

Following limited discovery, the parties filed cross-motions for summary judgment. The coal companies took the position that, "even though there presently exists a dispute as to the cumulative impact of [the regulations] upon plaintiffs' total investment in their respective business operations" (J. App. 58), the program was facially invalid.

⁴The coal companies also challenged the requirements that damage to surface land be repaired and that owners of unprotected structures be permitted to purchase coal for support. 25 Pa. Admin. Code §89.147; Pa. Stat. Ann. tit. 52, §1406.15 (Purdon Supp. 1986). J. App. 30-31. Those claims were rejected by the courts below (Pet. App. 21a-23a, 32a, 41-42a) and are not before the Court in this appeal.

3. The record before the District Court revealed that some of the coal companies own coal reserves, while others lease or control reserves. J. App. 81-83. The record does not reflect when the rights to these reserves were obtained by the coal companies, although for at least one of its mines, Consolidation Coal Co. did not complete acquisition of the property rights until 1981. J. App. 93. Approximately 90% of the coal reserves owned or controlled by the coal companies were severed from ownership of the surface in the period from 1890 through 1920. J. App. 94.⁵

The severance of these mineral rights was accomplished by deed provi-

⁵There are some notable exceptions to this practice. For example, Consolidation Coal Co. owns all the surface land which overlies the coal which it expects to mine from the present time through 1987. J. App. 227.

sions which reserved a number of additional property rights in the owner of the minerals. Specifically, the mineral rights were taken together with the rights to remove surface support and related waivers of damage for lack of support; to erect on the land structures to assist in the mining; to deposit waste on the land; to build roads railroads and drains on the land; and generally, to use the surface in a manner convenient to the mining of the coal. J. App. 95-134.

The record contained no evidence of what, if any, economic impact the regulatory program has had on the coal companies. The record revealed only that the companies had been required to leave in place for support of protected structures from .04% to 9.4% of the coal in their mines. J. App. 284.

Apparently, the coal companies' primary concern is that the subsidence control requirements make longwall mining more difficult in certain areas. See J. App. 64. The significance of this concern is difficult to gauge from the limited record. Longwall is but one of two alternative methods of so-called "full coal extraction" mining. J. App. 90. Both the longwall method and the alternative room and pillar method, produce total coal extraction ratios of about 75%. J. App. 90-91. The record did not reveal, however, to what degree the coal companies use full extraction methods. Nor is it clear that, when using the room and pillar method, the mine cannot be planned in such a way as to leave pillars in necessary support areas without affecting materially the

ultimate extraction ratio.⁶

4. The District Court initially responded to the parties' summary judgment motions by rejecting the coal companies' claims and entering final judgment for the State officials. Pet. App. 43a. The coal companies filed a motion for relief from judgment arguing that there remained for adjudication their claim that the subsidence regulations interfered with their investment-backed expectations. See Pet. App. 44a-45a. As the parties explained in their later application seeking certification for interlocutory appeal, the record was insufficient to decide the coal companies' investment-backed expectations claim because that

⁶Allegations in the complaint that the regulations will result in less coal being mined were denied. J. App. 26-27, 294.

claim required specific proof on the nature, timing and magnitude of their investment decisions. J. App. 15-16. The District Court first granted the motion for relief from judgment, Pet. App. 44a-46a, and later certified the facial claims which it had decided for interlocutory appeal. J. App. 8-9.

5. The District Court began its analysis by observing that the coal companies had not alleged that they had suffered any particular injury from enforcement of the subsidence prevention and repair requirements; the question before the court was "whether the mere enactment" of the statute amounted to a constitutional violation. Pet App. 27a.

Addressing first the impairment of contracts claim, the District Court held that, although the program requirements impair the coal companies' contrac-

tual rights, the program advances "significant and legitimate" public goals. Pet. App. 31a. In rejecting the claim, the District Court found that the adjustment of rights and responsibilities prescribed by the subsidence program is reasonably related to, and tailored to advance, the Commonwealth's legitimate interests. Pet. App. 31a-32a.

Turning to the taking claim, the District Court first disposed of the coal companies' assertion that the case was controlled by Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The District Court held that the current subsidence regulations differed from the prohibitions at issue in Pennsylvania Coal in at least three important respects: (1) the present program serves to protect public safety; (2)

the prior act was aimed at benefiting a small group of landowners, while the subsidence program is designed to prevent common, public harm; and (3) the former act, unlike the present program, did not apply to land owned by coal companies. Pet App. 33a-34a. Finding these significant differences between the previous act and the Subsidence act, not to mention over 60 years of intervening caselaw, the District Court proceeded to an analysis of the taking issue under more contemporary precedents.

Although noting that the taking question turns on the facts of each case (Pet. App. 36a), the District Court identified and then rejected as inapplicable several general sets of circumstances which have been found to amount to a taking. This case involved no permanent physical occupation of pri-

vate land by the government. The statute does not create a general easement for the public. Instead, the case concerned land-use regulations which, the court found, can be upheld as reasonably necessary to protect the health, safety and general welfare. Pet. App. 39a.

Finally, the District Court confronted the argument that the subsidence program destroyed completely a recognized property right -- the support estate. Construing state law, the court rejected this argument, holding that the coal companies' property rights were only partially affected. For example, they still retained the right to gain access to their coal through the surface, they could dig shafts for access and ventilation, and they were permitted to disturb underground wells.

Pet App. 39a-41a. The District Court noted that the support estate is a "nebulous concept" which has no inherent value standing alone. Pet. App. 41a n.6. Accordingly, the court rejected this claim.

6. The Court of Appeals agreed with the conclusions of the District Court. The court recognized that taking claims require individual analysis and that this Court has employed a variety of concepts to test these claims. Pet. App. 8a-10a. In rejecting the coal companies' assertion that Pennsylvania Coal controls, the Court of Appeals concluded that the statute at issue, unlike the law reviewed in Pennsylvania Coal, was designed to and did serve broad public purposes in encouraging land development and protecting the tax base. Pet. App. 131a.

Of critical importance to the Court of Appeals was the interrelationship between the so-called "support estate" and the other property interests held by the coal companies. In construing state law, the court noted that the support estate, although recognized as a separate property interest, has no value in itself. Pet. App. 15a. The court concluded that, "because the [coal companies] still possess valuable mineral rights that enable them profitably to mine coal" (Pet. App. 16a), the Subsidence Act did not amount to a taking of property.

Applying the test summarized by the Court in Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983), the Court of Appeals rejected petitioners' impairment of contracts claim. The court concluded that the

Subsidence Act was a reasonable and necessary measure to prevent "subsidence damage [which had] devastated many surface features and thus endangered the health, safety and economic welfare of the Commonwealth and its people." Pet. App. 19a-20a.

Summary of Argument

I. A. The case has reached this Court in an unusual posture--it is an interlocutory appeal from a decision rejecting what the coal companies label a facial takings claim. It is well-settled that a pure facial challenge, that is one in which no effort is made to demonstrate the impact of state regulation on particular parcels of land, will succeed only if the owner may make no "economically viable use of his land." Hodel v. Virginia Surface Mining and Reclamation Assn., 452 U.S. 264, 296 (1981). The coal companies do not confront the statute on this level, nor could they; plainly, they continue to operate their mines and to do so at a profit.

B. Although the challenge is a facial one, the record does reflect to some degree the impact of the statute on the companies' mines. But what it shows is that the impact is minimal. The statute requires that the coal companies leave in place only minuscule portions of their coal and it affects the support rights for only a limited class of structures.

Both courts below disputed the coal companies' contention that the support right is, under state law, some separate property interest which is deserving of independent protection under the Takings Clause. This right is valuable only when held together either with the surface rights or the mineral rights. In fact, the coal companies own or control, in addition to the support rights, a broad spectrum of other property interests which help to make

mining more convenient. The partial impairment of one of those interests--the support right--does not on its face state a taking claim. Andrus v. Allard, 444 U.S. 51, 66 (1979).

The coal companies cannot, at least on this record, claim that the law interferes with their reasonable investment--backed expectations. The Court never has endorsed the radical principle which the companies advance--namely, that a general intention to make the most profitable use of one's land in the future is sufficient to defeat subsequent regulation. Moreover, the record shows clearly that the statute, to the extent it makes new mining methods less practical, pre-dates investment decisions predicated on new technology.

C. Pennsylvania Coal does not require a decision in favor of the coal companies. We have no quarrel with the general rules of Pennsylvania Coal, but as even that decision makes clear, each case must be judged on its own facts. Moreover, subsequent decisions, reflecting the increasing complexity of society and the pressures of intensive land development, have refined the legal standards to the point where a landowner must prove by evidence in the record either severe economic impact, or direct governmental appropriation or occupation, before a taking will be found. See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, No. 84-4 (June 28, 1985). In Pennsylvania Coal, the Court assumed that the statute made mining commercially impractical. This is an assumption the law no longer permits.

More recent cases affirm that a property owner may, in appropriate circumstances, be deprived of assets, or restricted in his ability to use or dispose of property. Connolly v. Pension Benefit Guaranty Corp., No. 84-1555 (February 26, 1986); Goldblatt v. Hempstead, 369 U.S. 590 (1962). Pennsylvania Coal cannot be read to extend to coal some special protection from regulation not shared by other forms of property.

As the Court of Appeals held, Pennsylvania's statute serves important, broad public interests in encouraging land development, enhancing the tax base and protecting the environment. When this is weighed against the minimal impact on the companies' property rights, the statute plainly is constitutional.

II. The courts below properly analyzed the Contract Clause claim. It is now settled that a substantial impairment of contract rights is permissible if the adjustment is reasonable and appropriate to remedy broad, general social or economic problems. Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983). Given a sufficiently important and general public purpose, the Court will defer to the legislature's choice of the means to combat the problem, unless the state is a party to the contract. United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), which is not the case here.

It is uncontested that the statute is designed to serve important, general public purposes in encouraging land development, enhancing the tax base and promoting the state's economic

future. The Court should not second-guess the legislature's choice among available programs.

The coal companies' argument for a sliding scale test based on the severity of the impairment, which in their view requires a least restrictive alternative analysis here, finds no support in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978). That case rested not on the view that courts must judge de novo the legislature's choice among avenues at hand to address a problem, but on the separate point that only a clear legislative aim to remedy broad, general social or economic problems will justify a substantial impairment of contract rights. This analysis does not control here because it is plain that Pennsylvania's aims in constructing this program are appropriate.

ARGUMENT

I. Pennsylvania's Subsidence Control Program Is Consistent With The Fifth Amendment Because The Coal Companies May Make Economically Viable Use Of Their Mines And They Have Failed To Demonstrate Significant Impairment Of Their Investment--Backed Expectations.

Since 1966, Pennsylvania has required that coal companies mining under a limited class of structures provide support to prevent damage caused by "caving in, collapse or subsidence." Pa. Stat. Ann. tit. 52, §1406.4 (Purdon Supp. 1986). Now, some twenty years later, the coal companies assert that these requirements take their property without compensation in violation of the Fifth Amendment. The challenge is premised on similarities between Pennsylvania's regulatory program and a statute

disapproved more than sixty years ago in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). As we show below, the coal companies focus their argument too narrowly, concentrating entirely on the regulatory requirements rather than on a particularized examination of the economic impact of the program on their property. Thus, they seriously misstep in the central point of their argument -- that because subsidence prevention regulations were disapproved in Pennsylvania Coal, under no circumstances may coal miners be required to prevent subsidence damage.

A. Final Resolution Of A
Takings Clause Claim
Requires An Ad Hoc
Assessment Of The Impact
Of A Regulatory Program On
Particular Parcels Of Land

By now it is a familiar confession that the Court has been unable to develop a litmus test identifying when property has been taken. See Connolly v. Pension Benefit Guaranty Corp., No. 84-1555 (February 26, 1986), slip op. at 12-13; Williamson County Regional Planning Commission v. Hamilton Bank Of Johnson City, No. 84-4 (June 28, 1985), slip op. at 17; Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123-124 (1978). Whether a regulation amounts to a taking will depend "upon the particular circumstances of each case." United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

In Penn Central, the Court thoroughly reviewed its prior decisions and identified several factors which lend some structure to the "essentially ad hoc, factual inquiries" to be made in a taking case. Penn Central, 438 U.S. at 124. The factors which are of "particular significance" are: (1) "the economic impact on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." Ibid. Since Penn Central, the Court consistently has analyzed taking claims by judging the facts of each case against these factors. See Connolly v. Pension Benefit Guaranty Corp., supra, slip op. at 13-16; Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra, slip op. at 17; Ruckelshaus v. Monsanto Co., 467

U.S. 986, 1005-1008 (1984); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

The Court has emphasized that the Penn Central factors can be applied meaningfully only in the context of a concrete set of circumstances in which the challenger identifies specific parcels of land and the precise impact on that land of the challenged regulation. For example, in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, supra, the Court declined to address a Takings Clause claim in the absence of a final decision on how the challenged regulation would affect the property in question. Slip op. at 17; accord MacDonald, Sommer and Frates v. Yolo County, No. 84-2015 (June 25, 1986). The Court has explained that

"[t]hese 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." Hodel v. Virginia Surface Mining and Reclamation Assn., 452 U.S. 264, 295 (1981). See also Agins v. Tiburon, 447 U.S. 255, 260 (1980). A facial challenge to government regulation of property in which there is no evidence of the economic impact of the regulation will be successful only if the regulation "denies an owner economically viable use of his land." Agins, supra, 447 U.S. at 260, cited with approval in Hodel, supra, 452 U.S. at 296.

B. The Coal Companies Have Failed To Demonstrate That The Subsidence Control Requirements Have A Sufficiently Serious Impact On Their Property To Constitute A Taking

Pennsylvania's subsidence control program requires that underground coal mining be conducted so as to prevent subsidence damage to certain specified categories of structures and surface features. Pa. Stat. Ann. tit. 52, §1406.4 (Purdon Supp. 1986); 25 Pa. Admin. Code §89.143. Coal miners are required to submit to state officials subsidence control plans describing the methods which the miners will use to prevent or control subsidence. 25 Pa. Admin. Code §89.141(d)⁷. To safeguard

⁷The subsidence control plan is submitted as part of a comprehensive permit application. See 25 Pa. Admin.

(FOOTNOTE CONTINUED ON NEXT PAGE)

protected structures and surface features, the subsidence control plans either must provide that 50% of the coal will be left in pillars in support areas under the protected structures and features, or propose "[a]lternative methods, including full extraction techniques which result in planned and controlled subsidence," if the alternative measures are as effective in preventing subsidence damage. 25 Pa. Admin. Code §89.143(b)(3). See also J. App. 88, ¶31. When judged in light of the standards outlined above and the record developed in the District Court, this program plainly is constitutional.

(FOOTNOTE CONTINUED)

Code § 36.16. Any person dissatisfied with disposition of a permit application may appeal to the Environmental Hearing Board, Pa. Stat. Ann. tit. 71, § 510-21(a)(Purdon Supp. 1986), and then to Commonwealth Court, 42 Pa. Cons. Stat. Ann § 763(a)(1)(Purdon 1981).

1. In filing for summary judgment, the coal companies made no attempt to prove what, if any, economic impact the support requirements have on their businesses. See J. App. 52-59. There are no allegations of financial ruin, impending bankruptcy or even short-term losses. The coal companies frankly admitted in their motion that "there presently exists a dispute as to the cumulative impact of each of the [subsidence regulations] upon plaintiffs' total investment in their respective business operations" J. App. 58. In the parties' joint motion requesting that the District Court reconsider its refusal to certify the case for interlocutory appeal, the coal companies agreed that they had yet to offer proofs relating to the nature of their investment backed expectations," J. App. 15, and "the extent

to which plaintiffs' investment backed expectations have been or have not been destroyed." J. App. 16.

In its ruling, the District Court noted that because the companies "have not alleged any injury due to enforcement of the statute, there is as yet no concrete controversy regarding application of the specific provisions and regulations." J. App. 24a. The Court of Appeals agreed that the only claim before it was a facial one. J. App. 4a n.3.

In light of the coal companies' admissions and the basis on which the courts below proceeded, the applicable test would appear to be whether the regulatory program denies the companies "economically viable use" of their land. Hodel v. Virginia Surface Mining and Reclamation Assn., 452 U.S. 264, 296 (1981); Agins v. Tiburon, 447 U.S. 255,

260 (1980). On this score, Hodel would be dispositive since here, as in Hodel, the statute "does not categorically prohibit . . . coal mining; it merely regulates the conditions under which such operations may be conducted." Hodel, supra, 452 U.S. at 296. Again, as in Hodel, reliance on the decision in Pennsylvania Coal is misplaced in the absence of evidence that the regulations have sapped the land of its economic viability. Id. at 294.

In Hodel, the challenge was purely a facial one--the plaintiffs raised a pre-enforcement challenge and had not even identified specific property which would be affected by the regulations. In the absence of a record of any sort, the Court found it impossible to apply the Penn Central factors. Id. at 295. The situation

here, however, is somewhat different since the regulations have been in force for some time, the coal companies have identified specific mines which are affected by the program and there is some evidence of the impact of the regulations. It is possible, therefore, to assess at a level somewhat deeper than that available in Hodel the impact of the program on the companies' property. This examination reveals, however, that, like Hodel, the impact is minimal.

2. Before examining the economic impact of Pennsylvania's program on the coal companies, it is worth noting that some governmental regulation, by its character, constitutes a taking in spite of its minimal relative financial impact on the property owner. Into this category fall

cases in which the government has taken possession and physically occupied the land or has authorized others to do so. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979); United States v. Pewee Coal Co., 341 U.S. 114 (1951). See also United States v. Causby, 328 U.S. 256 (1946).

A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e.g., United States v. Causby, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central Transportation Co. v. New

York City, 438 U.S. 104, 124 (1978).⁸ Here no one has occupied the coal companies' property or interfered with their possession. So the character of the governmental action--an adjustment of private burdens--does not support a takings claim.

3.a The record discloses that the coal companies have left in place for support of protected structures amounts ranging from .04% to 9.4% of the coal in their mines. J. App. 284. Under any measure, this is a de minimus diminution in the companies' available coal reserves. See Penn Central Transportation Co. v. New York City, 438

⁸Even a State-authorized "physical invasion" is not necessarily a taking if there is a minimal impact on the value of the property or the owner's reasonable expectations. PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

U.S. 104, 131 (1978) (noting that the Court has refused to find a taking despite diminution in value as high as 87 1/2%).

The Court consistently has held that the impact of regulations alleged to work a taking of property must be measured against the owner's entire collection of property rights in the "parcel as a whole." Penn Central, supra, 438 U.S. at 130-131. Even the complete destruction of a particular property interest or a single segment of a parcel is not necessarily a taking of property requiring the payment of compensation. Andrus v. Allard, 444 U.S. 51, 66 (1979); Penn Central, supra, 438 U.S. at 130-131.

The coal companies own mines each with vast expanses of coal. They purchased these minerals simultaneously

with numerous other property interests, including waivers of liability for failure to support the surface; the right to deposit waste on the surface; the right to traverse the surface to gain access to the minerals; the right to sink mining shafts through the surface; and the right to erect buildings, railroads and other structures to aid the mining operations. J. App. 95-134. It is undisputed that Pennsylvania's subsidence prevention requirements interfere only minimally with these property rights.

As mentioned above, the relative amount of coal affected is small. Similarly, the regulations do not entirely abrogate the support rights which the coal companies own since Pennsylvania's program protects only a limited class of structures. For

example, commercial structures are not protected, nor are streets or highways.⁹ Of course, the additional property rights which the coal companies own are unimpaired by the regulations. The ultimate effect of the support requirements is that they may deprive the coal companies of the ability to utilize small portions of the coal and support rights which they own or control. Unhampered is their ability to exploit the overwhelming share of their coal and support rights, as well as all of the other property interests which they control.

⁹Pennsylvania law includes a specific procedure for condemnation of coal necessary to support "lands, easements or right of ways" acquired by the Commonwealth. Pa. Stat. Ann. tit. 52, § 1501 (Purdon Supp. 1986).

b. Both the Court of Appeals and the District Court recognized that the right to surface support, although referred to in Pennsylvania cases as an "estate in land," is but one property interest among many which the coal companies own or control. Pet. App. 15a-16a, 39a-40a. This interest "cannot be used profitably by one who does not also possess either the mineral estate or the surface estate." Pet. App. 15a. The coal companies now argue that the courts below "defined away" their property rights by disregarding state law. Pet. Br. 30.

It is probably sufficient to note that this Court consistently "has accepted the interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have

justified a different conclusion." Bishop v. Wood, 426 U.S. 341, 346 and n.10 (1976), quoted with approval in Runyon v. McCrary, 427 U.S. 160, 181 (1976). In fact, the coal companies provide no contradicting state authorities to demonstrate that the support right is something more than a part of their total property holdings, or has utility without ownership of either the minerals or the surface.

It seems absurd to suggest that, because Pennsylvania gives a loftier name to this property interest--calling it an estate, rather than an easement or a covenant--the entire taking analysis is set askew. Quite simply, Pennsylvania law provides only that the right of support remains in the owner of the surface and that this right may be conveyed (whether by the surface or the mineral owner) only by a specific

provision in the deed. Charnetski v. Miner's Mills Coal Mining Co., 270 Pa. 459, 113 A.683 (1921). The right of support is not some separate piece of property which is bartered on the open market apart from other, more substantial, interests in the parcel.

Ultimately, the coal companies cut the distinctions too finely when they argue that the government may prohibit a particular use of property which is recognized as a separate property right under state law, but regulation is invalid when this separate right is itself property. Pet. Br. 30-31. And it adds nothing to the companies' argument for them to say that this is "a physical restriction which abolishes a valuable estate in land." Pet. Br. 31. The short answer is that

"physical restrictions" are not per se takings, see, e.g., Goldblatt v. Hempstead, 369 U.S. 590 (1962), and Pennsylvania's subsidence control program hardly "abolishes" the support estate--it partially impairs the support rights which the coal companies control in each of their mines.

The Court has counselled that the "[r]esolution of each case . . . ultimately calls as much for the exercise of judgment as for the application of logic." Andrus v. Allard, 444 U.S. 51, 65 (1979). This has led the Court to examine taking claims in a practical, common-sense fashion, judging the effect of regulation in each case against the entire bundle of rights which the claimant controls. Id. at 65-66. In the final analysis, the coal companies' position requires that their holdings be fractured and examined in

their component parts. This violates the well-established rules discussed above and must be rejected.

4. Here there are a variety of unsettled questions which preclude final resolution of the investment-backed expectations issue. What is the impact of the regulations on the coal companies' businesses? Will one, two, all or none of their mines become too expensive to operate? What is the nature of the companies' investments, when were they made and were the companies' expectations reasonable at the time they were made? All that we know from the record is that varying minimal percentages of the total coal in each mine are necessary for support of protected structures. The limited record does not permit a definitive answer to the

relevant questions and the parties clearly did not contemplate that the questions would be resolved at this stage.

What there is in the record fails to support a claim of substantial interference with the companies' reasonable investment-backed expectations. In fact, it is difficult to determine exactly what were the companies' claimed expectations. Certainly, the companies cannot claim that they expected to remove all of the coal from their mines, or even all of the coal which technology would permit them to remove. Even with so-called "full extraction" techniques, only 75% of the coal is removed. J. App. 91. Moreover, there is a whole complex of regulations which requires that coal be left in place for a variety

of purposes. J. App. 92-93. See Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914) (upholding requirement that pillars of coal be left in place between mines).¹⁰

The coal companies' claim that their expectation was to maintain flexibility and insure maximum extraction (Pet. Br. 32) is just another way of saying that they expected to reap the maximum yield from their investment. Presumably, this is every businessman's expectation, or at least his goal. But

¹⁰One factor in judging reasonable expectations is the extent to which the particular industry has been subject to regulation. See Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1008 (1984). Coal mining was the subject of extensive regulation in Pennsylvania as early as 1891. See 1891 Pa. Laws 176. In 1914, the Court considered it to be "entirely settled" that coal mining was sufficiently dangerous to permit regulation. Plymouth Coal Co., supra, 232 U.S. at 540.

endorsement of this expectation as sufficient to prevent regulation would effectively emasculate the police power. The Court never has endorsed this radical principle. See, e.g., Andrus v. Allard, supra; Goldblatt v. Hempstead, supra; Hadecheck v. Sebastian, 239 U.S. 394 (1915).

It seems that the coal companies primarily are concerned that Pennsylvania's support requirements will inhibit their use of longwall mining techniques. See Pet. Br. 32; J. App. 92 ¶55. Even assuming that this concern is potentially of constitutional magnitude, any expectation that longwall mining could be conducted unfettered by regulation is not a reasonable one. Longwall mining is a new technique which became popular only after Pennsylvania's subsidence control program was established. Even the sparse record

developed below shows that one of the petitioners made a major commitment to longwall mining only in the "mid 1970's," another began planning later, and the remaining companies apparently do not use this method at all. J. App. 93. The timing of a company's acquisitions and other investments is often a crucial factor in analysis of investment-backed expectations. Andrus, supra, 444 U.S. at 64-65 n.21. What is in the record on timing belies the companies' claim.

Moreover, the record is hardly clear that any inhibition of longwall mining will have a substantial effect on the companies' operations. The room and pillar method results in the same percentage of extraction. J. App. 91. The companies have not shown that they cannot leave pillars in such a configuration as to provide support where

necessary and still achieve the same relative extraction ratios.

It may turn out that the coal companies can prove that the nature of their expectations and the timing of their investments supports a takings claim. Presumably, these facts will vary from company to company and mine to mine. See Hodel v. Virginia Surface Mining and Reclamation Assn., 452 U.S. 264, 297 n.40 (1981). But on this record, the companies have failed to show a substantial interference with their reasonable investment-backed expectations.¹¹

¹¹The coal companies' heavy reliance on Kaiser Aetna v. United States 444 U.S. 164 (1979) is misplaced. That case disapproved government action which authorized the public to physically invade another's land. Physical invasion cases stand on a different footing than do regulations, such as those here, which only restrict the use of property. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

C. Pennsylvania Coal Does Not Require That All Coal Mine Subsidence Regulation Be Held Unconstitutional

The coal companies premise their argument almost entirely on Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). It is their position that the statute struck down in Pennsylvania Coal is indistinguishable from the one before the Court in this case requiring a finding of unconstitutionality. This analysis ignores both the Court's treatment of Pennsylvania Coal in subsequent opinions and the mode of analysis consistently applied by the Court since Pennsylvania Coal.

1. Pennsylvania Coal began as an equity action brought in state court by homeowners who sought an injunction to prevent coal mining under their house in such a manner as to cause subsidence. The plaintiffs' claim was

premised on the Kohler Act, 1921 Pa. Laws 1198, which prohibited mining which caused subsidence to any building used by the public; any street, road or other public passageway; any track or other facility used by public utilities; any dwelling, factory, store, or other industrial or commercial establishment; or any cemetery. See Pet. App. 57a. The coal company defended by pointing out that the plaintiffs had waived their right to collect damages for subsidence and by arguing that the statute was unconstitutional. Pennsylvania Coal, supra, 260 U.S. at 412.

In reviewing the claim, the Court observed that the government is not required to pay compensation for every action which diminishes individual property rights. One factor which a court must consider is "the extent of the diminution." Id. at 413. Each case

must be judged on its "particular facts." Ibid. When the diminution reaches a certain magnitude the government must proceed by eminent domain and pay compensation.

Having stated these general principles, the Court examined the case initially as involving only "a single private house." Ibid. The Court found the public interest in the house to be "limited" and to be clearly outweighed by the extent of the taking. Id. at 413-414. At this point, the Court had decided the precise case before it; but the Court went further.

Responding to the urging of State and local officials who sought a broader decision, the Court concluded "that the act cannot be sustained. . . so far as it affects the mining of coal under streets or cities. . . ." Id. at

414. In the key portion of its opinion, the Court explained:

What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.

Id. at 414-415. Based on this assumption that the statute prevented profitable coal mining, the Court found the law to be unconstitutional.

2. Since Pennsylvania Coal, the Court has cited the opinion for several principles, most prominently that excessive regulation may amount to a taking. See Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, No. 84-4 (June 28,

1985), slip op. at 12, 24; Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1004-1005 (1984); PruneYard Shopping Center v. Robins, 447 U.S. 74, 83 (1980); Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962). Pennsylvania Coal also has been relied on for the proposition that one relevant factor in determining whether regulation has gone "too far" is diminution in the value of the property. See, e.g., Andrus v. Allard, 444 U.S. 51, 66 (1979); Goldblatt, supra, 369 U.S. at 594. Finally, Pennsylvania Coal is seen as resting on the notion that "public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" Penn Central Transportation Co. v. New York City, 438 U.S. 104, 127 (1978).

We have no quarrel with these rules. Nor do we argue that the case needs to be overruled. Rather, it is appropriate that the Court continue to heed the admonitions of Pennsylvania Coal itself--the taking question "cannot be disposed of by general propositions," 260 U.S. at 416; "the question depends upon the particular facts." Id. at 413.

3. The "particular facts" regarding the impact of Pennsylvania's program on the coal companies' reasonable investment-backed expectations are not before the Court--proof of those facts has been reserved for later trial. See J. App. 15-16. To be sure, in Pennsylvania Coal there were no estimates in the record of economic impact or diminution in value; instead, the Court assumed that the statute made coal mining "commercially impracticable."

260 U.S. at 414-415. If there is anything infirm about the decision in Pennsylvania Coal, it is the Court's assumption that the coal company's expectation--to mine coal at a profit--was entirely destroyed by the statute.

In the years following Pennsylvania Coal, the Court increasingly has become insistent that economic impact and interference with investment-backed expectations be demonstrated with precision and particularity. For example, the Court rejected a district court's reliance on Pennsylvania Coal to assess the validity of federal mining laws in the absence of proof regarding "particular estimates of economic impact and ultimate valuation." Hodel v. Virginia Surface Mining and Reclamation Assn., 452 U.S. 264, 294-295 (1981). See

also Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, No. 84-4 (June 28, 1985), slip op. at 17 (resolution of taking claim premature before precise effect of regulation on property ascertained). As we have pointed out earlier, supra p. 47, the record is insufficient on this score.¹²

¹²Any claim that the coal companies had enforceable expectations based on the decision in Pennsylvania Coal suffers from several weaknesses. As we explain in the text, that case does not stand for the bald propositions which the companies urge. Moreover, even if it once stood for the blanket rule which the companies assert, no one has a vested right in a particular rule of law. See Munn v. Illinois, 94 U.S. 113, 134 (1876). Finally, the coal companies' alleged reliance on the rule which they now extract from Pennsylvania Coal is suspect in light of their successful compliance with Pennsylvania's regulations for the past 20 years.

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4. Although it is not entirely clear, the coal companies apparently premise their claim on the assertion that it is a taking for state law to require that they leave in place any coal or relinquish any of their support rights. This is the only conceivable characterization of the companies' position since Pennsylvania's subsidence control requirements plainly permit the companies to mine most of their coal and require that support be provided only

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The coal companies concede on the one hand that the Court has insisted on "case-by-case decision making" (Pet. Br. 22), but on the other hand claim that stare decisis requires that the statute here be struck down because a similar statute was disapproved in Pennsylvania Coal. Pet.Br.23. In reality what the coal companies argue for is collateral estoppel which, in light of changed circumstances, different facts and the evolution of the law, not even they have temerity to invoke directly.

for limited classes of structures and surface features. If, as the coal companies suggest, Pennsylvania Coal supports this position, it has been severely undercut by subsequent decisions.

Goldblatt v. Hempstead, 369 U.S. 590 (1962), upheld a local ordinance which prohibited excavations below the water line and required that excavations below that level be refilled. The owners of a sand and gravel business brought suit alleging that the ordinance prevented them from continuing their business. Despite the fact that the ordinance prohibited use of the soil itself and prevented the owners from removing their sand and gravel, the ordinance was approved.

In Andrus v. Allard, 444 U.S. 51 (1979), the Court rejected a challenge to a federal statute which

prohibited owners of eagle feathers from selling them. Although the statute clearly destroyed entirely the most lucrative property interest which the owners possessed, the Court was persuaded to uphold the statute because of the owner's failure to show that his rights had been extinguished entirely.

Goldblatt and Andrus confirm that restrictions on the use of property, even to the point of prohibiting the sale of property which has little value except for resale, do not necessarily run afoul of the Takings Clause. The government may regulate by adjusting private rights even to the point of "curtail[ing] some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase." Andrus, supra,

444 U.S. at 65 (emphasis in original). In Andrus, the Court was persuaded to uphold the statute because the owners of feathers still retained limited property rights--the rights to possess, transport and exhibit the feathers. Id. at 66. In Goldblatt, there was no evidence that the prohibition of mining would substantially reduce the value of the lot. 369 U.S. at 594. Similarly, here the coal companies have been deprived only of portions of their property and have offered no evidence of serious economic impact.¹³

¹³The Court has recognized that decisions upholding land use regulations preclude reliance on Pennsylvania Coal for the proposition that a land owner may have a reasonable expectation in full use of its property "irrespective of the impact of the regulation on the value of the property as a whole." Penn Central, supra, 438 U.S. at 130 n.27.

Particularly instructive is the Court's recent decision in Connolly v. Pension Benefit Guaranty Corp., No. 84-1555 (February 26, 1986). Despite the fact that employers subject to the Multi-employer Pension Plan Amendments of 1980, 94 Stat. 1208, were "permanently deprived" of substantial assets (slip op. at 10), the Court refused to find a violation of the Takings Clause. "It cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." Slip op. at 11. Neither were the employers protected by the terms of their pension contracts which limited their liability. Contracts dealing with matters properly the subject of governmental regulation suffer from a "'congenital infirmity.'" Slip op. at 12, quoting Norman v. Baltimore and Ohio R. Co., 294

U.S. 240, 307-308 (1935). The Court refused to find the pension act amendments facially invalid, opting instead for application of the ad hoc examination discussed earlier, supra p. 29.¹⁴

If a businessman may be permanently deprived of dollars to satisfy a pension obligation despite contractual provisions absolving him from that liability, it is difficult to understand why the result should be different because the case involves lumps of coal and related waivers of liability for damage caused by removal of the coal. Connolly makes it clear, if it was not apparent before, that a taking

¹⁴See also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) (rejecting due process challenge to statute imposing retroactive liability on coal mine operators for injuries suffered by former employees).

claim must be judged, not on the simple allegation that regulation permanently deprives a person of an asset, but only after an examination of all the facts. In this case, the coal companies have not provided the Court with all of the relevant facts and what is in the record fails to support a taking claim.

5. The Court of Appeals found Pennsylvania Coal not to be dispositive of the coal companies' claim at least in part because Pennsylvania's current subsidence control program promoted far broader public purposes than the statute reviewed in Pennsylvania Coal. Pet. App. 12a-14a. As the Court of Appeals observed (Pet. App. 13a), the modern statute is supported by detailed legislative findings and declarations of policy. Pa. Stat. Ann. tit. 52, §1406.3 (Purdon Supp. 1986). It is essentially

a land conservation measure, Pa. Stat. Ann. tit. 52, §1406.2 (Purdon Supp. 1986), which is designed to protect the health, safety and welfare of the people of Pennsylvania by promoting better utilization of the land; preserving and enhancing the tax base; and generally, protecting and insuring the economic future of the Commonwealth. Pa. Stat. Ann. tit. 52, §1406.3 (Purdon Supp. 1986). The coal companies do not contest that these purposes are well-served by the program. By contrast, only safety was offered as a justification for the statute in Pennsylvania Coal, 260 U.S. 413-414, a justification found wanting since safety could be assured by notice to those living above the mines. 260 U.S. 414.

The coal companies take issue with the comparison of public interests, arguing that the Court of Appeals

misperceived the nature of its inquiry. Pet. Br. 28-29. In their view, the relevant questions are: first, whether the regulation serves a valid public purpose; and second, whether the impact on the property owner is sufficient to amount to a taking. Pet. Br. 29. Again, in their view, the Court of Appeals misstepped by viewing the taking issue as turning entirely on the satisfaction of the public purpose requirement. Of course, the Court of Appeals did no such thing.

The court assessed very carefully the impact of Pennsylvania's regulations on the coal companies' property interests. It simply concluded that the impact was minimal since the companies retained substantial property rights, they did not claim that their business had been rendered unprofitable, and any expectations which they may have

harbored were unreasonable. Pet. App. 14a-17a. There is no suggestion by the Court of Appeals that any public purpose sufficient to pass the relaxed public purpose test, see Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), would justify a taking of property without compensation.

Although there is some surface logic to the coal companies' approach, the Court never has so tightly compartmentalized its analysis. Pennsylvania Coal itself reflects balancing of the public interest against the impact on property rights. 260 U.S. at 414. Later cases have confirmed that the magnitude of the public interest, although perhaps not determinative, is a factor to be included in the equation in each case. See Agins v. Tiburon, 447 U.S. 255, 261 (1980) (taking "question necessarily requires a weighing of

private and public interests"); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) ("determination whether a taking has occurred must take into consideration the important public interest"); id. at 188 (Blackmun, J., dissenting) ("question requires a balancing of private and public interests"); United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958) (property restrictions "insignificant when compared to widespread" public interest).

Perhaps the best illustration of a case in which the public interest at stake was found to outweigh private property rights is Miller v. Schoene, 276 U.S. 272 (1928). In Miller, the Court found that the legislature could determine that the apple growing industry was "of greater value to the public," id. at 279, thereby justifying

a program for destruction of cedar trees infected with a disease fatal to apple trees.

The coal companies take no issue with the Court of Appeals' conclusion that Pennsylvania's modern subsidence control program serves important, far-reaching public purposes. In Pennsylvania, as is the case throughout the country, the effects of insufficiently regulated mining activities are reflected in devastation to our land, water and wildlife. See 30 U.S.C. §1201(c); S. Rep. No. 95-128, p.50 (1977). Equally destructive is the mounting pressure which subsidence damage, and the unproductive land which it creates, places on a shrinking tax base. These effects have increased over time--what was an issue of safety in 1921 has become today a statewide and

nationwide problem affecting the well-being of the entire citizenry.

On the other side of the balance, today's regulatory program is far more moderate than the prohibitions reviewed in Pennsylvania Coal. The statute in that case provided protection for every conceivable structure; Pennsylvania's present program covers only limited classes of structures. Compare 1921 Pa. Laws 1198, §1 (Pet. App. 57a), with Pa. Stat. Ann. tit. 52, §1406.4 (Purdon Supp. 1986). Moreover, unlike the older statute, the present program concentrates on preventing, not all subsidence, but only subsidence which causes damage. See Pa. Stat. Ann. tit. 52, §1406.4 (Purdon Supp. 1986) (mining shall be conducted so as not "to cause damage as a result of . . . subsidence"

to specified structures). This significant shift in emphasis is underscored by the authorization for miners to use "full extraction techniques which result in planned and controlled subsidence" to protected structures and features, if that method will be as effective as leaving support. 25 Pa. Admin. Code §89.143(b)(3)(ii).

* * * *

Much has changed since Pennsylvania Coal. The destruction wrought by subsidence has mushroomed into a societal concern, rather than an individual one. Pennsylvania has responded with a program which "harmonize[s] the protection of surface structures and the land supporting them [with] the continued growth and development of the bituminous coal industry in

the Commonwealth." Pa. Stat. Ann. tit. 52, §1406.3 (Purdon Supp. 1986). At least one court has observed that a broad reading of Pennsylvania Coal is unwarranted in light of subsequent decisions upholding comprehensive zoning ordinances. Consolidated Rock Products v. City of Los Angeles, 20 Cal.Rptr. 638, 370 P.2d 342, appeal dismissed, 371 U.S. 36 (1962) (upholding ordinance which prohibited rock and gravel mining despite finding that property had no appreciable value for other purposes).

In its seminal zoning decision this Court observed that changing conditions justified restrictions on the use of property which would have been unthinkable in earlier times. Euclid v. Ambler Co., 272 U.S. 365 (1926). The Constitution is unchanging, but application of its principles "must expand or

contract to meet the new and different conditions which are constantly coming within the field of their operation." Id. at 387. The Court has responded to the congestion and urbanization of modern society by requiring that, to establish a regulatory taking, there must be specific proof of severe economic impact or destruction of investment-backed expectations. This shift in focus requires that impact be shown on the record (not assumed as in Pennsylvania Coal), a showing which the coal companies thus far have been unable to make. For these reasons, the taking claim must be rejected.¹⁵

¹⁵ An injunction against an alleged taking is not appropriate if compensation is available. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984). In Pennsylvania, the power of eminent domain may be exercised only with the

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"authority of law." Pa. Const. art. I, §10. This requires legislative authorization. Rosenblatt v. Pennsylvania Turnpike Commission, 398 Pa. 111, 136, 157 A.2d 182, 194 (1959) (Bell, J., concurring and dissenting); Philadelphia's Petition, 253 Pa. 434, 435, 98 A. 620 (1916); Lazarus v. Morris, 212 Pa. 128, 130, 61 A. 815, 816 (1905). The Subsidence Act itself contains no general provisions for compensation. Other state laws permit the purchase of support coal in limited circumstances. See Pa. Stat. Ann. tit. 52, §1501 (Purdon Supp. 1986) (State may be required to pay compensation for coal necessary to support state lands, easements or rights of way); Pa. Stat. Ann. tit. 53, §5209 (political subdivisions authorized to acquire by eminent domain coal necessary to support lands and structures). The first statute is quite limited and the later provision, passed seventeen years prior to the Subsidence Act (1949 Pa. Laws 1474), hardly was intended to require that local governments pay compensation for compliance with regulations administered by state agencies.

II. The Subsidence Repair Or
Compensation Requirements
Are Consistent With The
Contract Clause Because
They Are Reasonable And
Appropriate To Accomplish
Significant And Legitimate
Public Purposes

The coal companies challenge separately the provision which requires that subsidence damage to the limited class of structures protected by the Subsidence Act be repaired or compensation paid for the damage. Pa. Stat. Ann. tit. 52, §1406.6 (Purdon Supp. 1986).¹⁶ They claim that this law impermissibly impairs the contractual waivers of liability which their predecessors in title had obtained at the time that they secured the minerals

¹⁶The repair or compensation provision applies only to the structures listed in the statute, not to the broader class mentioned in the regulations.

and the other contract rights discussed earlier. Under the well-settled rules for assessing Contract Clause claims, rules which were properly applied by the courts below, this claim lacks arguable merit.

Although the constitutional prohibition against the impairment of contracts is facially absolute, "its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 410 (1983), quoting Home Bldg. and Loan Assn. v. Blaisdell, 290 U.S. 398, 434 (1934). The threshold inquiry is "'whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.'" Energy

Reserves Group, supra, 459 U.S. at 411, quoting Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

If there is a substantial impairment, the state must justify its law by a "significant and legitimate public purpose behind the regulation." Ibid. Remediating broad and general social or economic problems is the hallmark of an appropriate public purpose; there need not be an emergency or temporary situation. Id. at 412. The "requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests." Ibid.

Finally, when a significant and legitimate public purpose has been identified, the inquiry turns to "whether the adjustment of the 'rights

and responsibilities of the contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" Id. at 412 (alterations in original; citation omitted). Moreover, "unless the State itself is a contracting party, . . . '[a]s is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" Id. at 412-13, quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 22-23 (1977). The contractual modifications at issue here easily pass this test.

A. The Modification Of Contractual Obligations Is Sufficiently Substantial To Trigger Contract Clause Analysis

At the first stage of the inquiry, the question is whether there has been an impairment of contract rights and, if so, how substantial it is. The severity of the impairment has some effect on the nature of the court's examination. Energy Reserves, supra, 459 U.S. at 411; Allied Structural Steel, supra, 438 U.S. at 245. What this means is that a "minimal alteration" of obligations will terminate the Court's examination of the legislation at that stage; there is no need to examine the legislative purpose or the reasonableness of the statutory requirements. Allied Structural Steel, supra, 438 U.S. at 245.

Here the degree of impairment is not minimal; it is sufficiently substantial to warrant examination of the legislative purpose and the reasonableness of the adjustment of rights. The coal companies possess waivers of liability for surface damage caused by subsidence; but as a result of the subsidence control program, they now may not rely on those waivers if certain structures are damaged by subsidence. This is a sufficient impairment to trigger further scrutiny.¹⁷

¹⁷The impairment, although sufficiently "substantial" to trigger Contract Clause examination, hardly rises to the devastating proportions argued by the coal companies. As we have mentioned, the coal companies are in the business of mining and selling coal -- a business which they have conducted profitably for the 20 years since passage of the Subsidence Act. Moreover, the overwhelming portion of their coal may be mined and sold irrespective of the regulatory requirements. The program affects but a small portion of their contractual rights.

B. Given A Valid Legislative Purpose, The Courts Will Defer To The Legislative Judgment That A Particular Adjustment Of Contract Rights Is Reasonable And Appropriate Provided The State Is Not A Contracting Party

The coal companies persist in labelling the impairment as "complete" or "severe" (Pet. Br. 35) arguing that, if the impairment is severe, the presumption of constitutionality disappears and the courts owe no measure of deference to a legislative judgment that the regulatory measure is an appropriate means to deal with the problem at hand. This argument suffers from both legal and factual weaknesses.

1. Even assuming that the impairment properly is labelled as "severe" (see infra, p. 90), the coal companies' legal position lacks arguable support in precedent or logic. What this Court

has held repeatedly is that, if the impairment is minimal, the legislative purpose and reasonableness of the legislation need not be examined. Allied Structural Steel, supra, 438 U.S. at 245. See also National Railroad Passenger Corp. v. Atchison, T. & S. F. Ry., No. 83-1492 (March 18, 1985), slip. op. at 20. If the impairment is substantial, the legislative purpose must be examined carefully; there must be a record that the legislature acted to further significant and legitimate public purposes, the hallmark being an intent to "remedy[] . . . a broad and general social or economic problem." Energy Reserves Group, supra, 459 U.S. at 411-412. Only if the legislation impairs contracts to which the state is a party, will the Court decline to accord deference to the state's choice

of means to address the problem. United States Trust, supra, 431 U.S. at 22-23, 25-26; see also Energy Reserves Group, supra, 459 U.S. at 412-413.¹⁸ In this case, the coal companies never argue that the state is a contracting party, so under the test repeatedly endorsed by the Court, the deferential standard for examining the appropriateness of the measures chosen must be applied.

The coal companies misread Allied Structural Steel in arguing to the contrary. In that case the Court found that the impairment was sufficiently substantial to trigger an examin-

¹⁸The concept of deference to the legislative judgment that a particular impairment is necessary is not a new concept. Both before and after the watershed Blaisdell case, the Court endorsed this principle. See East New York Bank v. Hahn, 326 U.S. 230, 233 (1945); Manigault v. Springs, 199 U.S. 473 (1905).

ation of the stated legislative purpose. 438 U.S. at 245. What the Court found was that there was no valid purpose. The legislation itself was silent on the topic. The District Court and a state court in another case speculated as to the purpose, id. at 247-248 and n.19, but there was "no showing in the record that this severe disruption of contractual expectations was necessary to meet an important general social problem." Id. at 247 (emphasis supplied). The legislation had "an extremely narrow focus," id. at 248, therefore failing to meet the requirement that legislation impairing the obligations of contracts "protect a broad social interest." Id. at 249. Allied Structural Steel is not, however, authority for a sliding-scale test in which the courts are called upon first to gauge the relative substantiality of

the impairment and then to weigh it against the legislature's choice of means to deal with the problem.

We need not belabor the point that it makes sense, both from a practical and institutional standpoint, for the Court to defer in large measure to legislative choices of particular means to deal with problems admittedly within its sphere to resolve. The courts are ill-placed to choose among competing alternatives to social problems. Legislatures with their superior fact-finding capabilities are designed better to perform this task. Intrusion by the courts into the policy-making domain raises separation of powers and federalism concerns as well. "A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any

situation. . . ." Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring). It would be out of line with reason and precedent to engraft onto Contract Clause analysis the least restrictive alternative test urged by the coal companies.¹⁹

¹⁹This is not to say that the contract clause is coextensive with the Due Process Clause. See National Railroad Passenger Corp., supra, slip op. at 21 n.25. To pass due process scrutiny, legislation need only be rational and not arbitrary. Id. at 21. As we outline above, Contract Clause analysis requires that the legislative purpose be to remedy broad social problems of significant import. Moreover, unlike due process analysis, Contract Clause jurisprudence does not permit deference to legislative judgments when the affected relationship is with the state itself. United States Trust Co., supra.

2. As to the facts²⁰, for many of the same reasons outlined earlier (supra, p. 47,), the record does not permit a complete assessment of the magnitude of any impairment. Clearly, however, the subsidence program does not apply to all land which overlies the coal companies' mines--only to those areas occupied by the limited class of protected structures. The coal companies own the surface land over some of their mines; in fact, Consolidation Coal Co. owns all the surface land under which it will mine through 1987.

²⁰The coal companies' claim of "complete" or "severe" impairment loses considerable force in light of their inability to demonstrate a taking. See Argument I, supra. If the impairment is insufficiently substantial to support a Takings Clause claim, it is difficult to comprehend how it still can be "severe" enough to trigger some superior level of scrutiny in the context of a Contract Clause claim.

The contracting party's reasonable expectations are relevant to the substantiality of impairment question. Energy Reserves Group, supra, 459 U.S. at 411; United States Trust, supra, 431 U.S. at 31. Yet, Consolidation Coal Co. did not complete acquisition of the rights for its new major project until 1981 (J. App. 93)-- fifteen years after this legislation was passed. It is difficult to gauge on this record how great is the impact of this legislation. By any measure, however, the coal companies' rights are not completely abrogated.

Also important is the relationship of this particular contract right, a waiver of liability for damage, to the entire undertaking of which it was a part. See El Paso v. Simmons, 379 U.S. 497, 514-515 (1965). It is safe to say that the coal companies are inter-

ested primarily in coal--the coal is the "central" feature of their contracts with landowners. The other terms of the contract for mineral rights are significant only because they make it easier, or sometimes possible, to extract the coal. Viewed as a whole, the coal companies' contract rights are affected only minimally.

C. The Subsidence Repair Or Compensation Requirements Are Designed To Serve Admittedly Legitimate Public Purposes And Actually Advance Those Purposes

1. The coal companies never question the obvious conclusion that Pennsylvania's subsidence control program serves broad, general social interests--that it is, in fact, a proper exercise of the police power. The legislature declared specifically that the Act "shall be deemed to be an exercise of the police powers of the Commonwealth...." Pa. Stat Ann. tit. 52, § 1406.2 (Purdon Supp. 1986). The state legislature prefaced its enactment with substantial, unchallenged findings and declarations of purpose. Pa. Stat. Ann. tit. 52, §§1406.2 and 1406.3 (Purdon Supp. 1986). The legislative findings amply support the judgment that prevention and

repair of subsidence damage is necessary to protect and foster health, safety and economic well-being throughout Pennsylvania. This distinguishes the case from Allied Structural Steel and triggers the deferential standard of review at the next level of inquiry.

2. There remains the final question--whether the adjustment of private rights which the statute accomplishes is based on "reasonable conditions and [is] of a character appropriate to the public purpose justifying its adoption." United States Trust, supra, 431 U.S. at 22. The coal companies cannot dispute that requiring coal miners to repair subsidence damage to protected structures or compensate the owners for the damage will serve the statute's purposes. Buildings maintained in a proper state of repair not

only are safer, they help to bolster the tax base, improve the quality of life in the entire community and generally enhance the economic well-being of the State. It is entirely reasonable and appropriate for the legislature to conclude that the responsibility to insure that subsidence damage is repaired is fairly given to those who caused the damage and profited from the ability to mine without regard to the destruction occurring above. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 18 (1976). Finally, by placing the obligation on the coal miners, the legislature provided an effective remedy which not only insures that repairs are the duty of someone with the means to carry them out, but also provides an incentive for coal companies to conduct their operation in such a way as to minimize subsidence damage. As the

District Court found, the primary aim of the statute is to prevent subsidence damage in the first place. Pet. App. 31a-32a. No other repair or compensation scheme serves the purpose of encouraging compliance with the subsidence prevention requirements.²¹

In light of the deference accorded to the legislative judgment, Energy Reserves Group, supra, 459 U.S. at 412-413; United States Trust, supra, 431 U.S. at 22-23, it is absolutely clear that the means chosen by the legislature are reasonable and appropriate. Moreover, even if the more demanding test suggested by the coal

²¹Although the statute does not specifically require that property owners who receive compensation actually repair their structures, the Court of Appeals concluded (Pet. App. 20a), and the coal companies do not contest, that it was reasonable for the legislature to conclude that repairs would be made.

companies must be applied, they have failed to suggest an appropriate alternative. To be sure, as the coal companies point out (Pet. Br. 47), since 1961 the state has sponsored a subsidence insurance program. Pa. Stat. Ann. tit. 52, §3201 et seq. (Purdon Supp. 1986). But in 1966 the legislature found that "(p)resent mine subsidence legislation. . . [has] failed to protect the public interest in Pennsylvania in preserving our land." Pa. Stat. Ann. tit. 52, §1406.3 (Purdon Supp. 1986). The Court should not accept the coal companies' invitation to second-guess this legislative judgment.²²

²²It is worth noting that the insurance program had a purpose entirely different from the Subsidence Act. Insurance was thought necessary to meet problems created by past mining practices for which "effective measures

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3. It is difficult to understand the significance which the coal companies attach to whether the circumstances prompting legislation which impairs contracts were foreseeable at the time the contracts were signed. While it is true that the Contract Clause was adopted to "enable individuals to order their personal and business affairs," Allied Structural Steel, supra, 438 U.S. at 245, the clause never has been understood to require that, as soon as a problem is perceived, the government must act before private contracts can intervene. /

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cannot readily be taken at this late date for elimination of the problems." Pa. Stat. Ann. tit. 52, § 3201 (Purdon Supp. 1986). Of course, the Subsidence Act was designed to prevent damage. Id. at § 1406.3.

A problem generally might be foreseeable, but the magnitude and the precise effect of the problem, or the best method for dealing with the situation, may not become apparent until many years later. Certainly it was foreseeable that lotteries and intoxicating beverages could seriously harm the public, yet the Court had no difficulty in upholding laws prohibiting those businesses despite the severe impairment of contracts which resulted. See Mugler v. Kansas, 123 U.S. 623 (1887); Stone v. Mississippi, 101 U.S. 814 (1879); Beer Co. v. Massachusetts, 97 U.S. 25 (1877). The government is entitled to stay its hand without risking that it will lose the power to regulate.

In any event, the legislative findings show that the circumstances which prompted the Subsidence Act were unforeseeable when the contracts were executed. The legislature found that the cumulative effects of subsidence had "seriously impeded

land development" and eroded the "tax base." Pa. Stat. Ann. tit. 52, §1406.3 (Purdon Supp. 1986). Were these modern problems foreseeable at the turn of the century? There is no evidence that anyone could have foreseen in 1890 (when the mineral rights were first purchased) the reliance which communities place today on land development and the resulting improvement of the municipal tax base. Even if foreseeability should be considered, the coal companies' argument must be rejected.

The Contract Clause is an important protection for private bargains, but it does not bar the government from protecting the general welfare. There is no disagreement that the Subsidence Act is designed to serve important, legitimate, general public purposes and clearly, it significantly advances those purposes. The Court should not accept the invitation to displace the legislative judgment. The statute should be upheld.

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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REPLY
BRIEF

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

KEYSTONE BITUMINOUS COAL ASSOCIATION, HELVETIA
COAL COMPANY, ROCHESTER & PITTSBURGH COAL COM-
PANY, U.S. STEEL MINING CO., INC., UNITED STATES
STEEL CORPORATION, and CONSOLIDATION COAL COM-
PANY,
Petitioners,

v.

NICHOLAS DEBENEDICTIS, PHILIP ZULLO,
and THOMAS B. ALEXANDER,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In our opening brief, we argued that Section 4 of the Bituminous Coal Act and its implementing regulations constituted a clear unconstitutional "taking" of petitioners' coal under this Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and that Section 6 of the Act destroyed the obligations of contracts between petitioners and the owners of surface lands over petitioners' coal mines in violation of the Contract Clause of the Constitution. Respondents and their *amici* have presented several arguments in response to both issues that warrant a reply.

I. THE TAKINGS CLAUSE

This is not a zoning case. It does not involve nuisance, or disease control, or the elimination of one of several uses to which property might be put. The law at issue here prevents the owners of certain identifiable coal from using it for the only purpose for which it has any value.¹ Both in its general principle (complete deprivation of all value) and in its specific application (requiring a coal owner to leave coal in the ground in order to serve a public purpose) this case is different from all the cases on which the respondents and their *amici* rely, and is squarely governed by one. The respondents correctly note the uncertainty concerning some aspects of this Court's Takings Clause jurisprudence. One principle, however, has remained settled for two-thirds of a century: governments may not constitutionally achieve their purposes by requiring the owner of certain coal to give up the only ownership right that is of any value, the right to mine it. That simple principle remains good law and governs this case.

¹ Respondents' *amici* fail to recognize the nature of petitioners' subsurface property interests. In Pennsylvania, severed coal is recognized as a separate estate in land. Lying hundreds of feet beneath the surface owned by others, it has only one use in the hands of petitioners. It has no value if it cannot be mined.

A. Our primary argument under the Takings Clause is that the statute at issue in this case is identical to the statute at issue in *Pennsylvania Coal*. Accordingly, the impact of Section 4 on petitioners' property rights is identical to the impact of the statute at issue in *Pennsylvania Coal*, and therefore the holding in *Pennsylvania Coal* that the Kohler Act was unconstitutional requires the Court to hold that Section 4 is unconstitutional. Respondents and their *amici curiae* simply do not address the dispositive point that Section 4 of the Bituminous Coal Act and the provision of the Kohler Act declared unconstitutional in *Pennsylvania Coal* are identical except that the word "bituminous" is substituted for "anthracite." Moreover, as the legislative history of the Pennsylvania statute clearly reveals (Pet. Br. 22 n.25), the state legislature enacted the law with the express understanding that it was re-enacting the Kohler Act for bituminous coal.² Thus, unless the Court follows the prediction of the Pennsylvania legislators when they enacted Section 4 (Pet. Br. 22 n.25) and overrules the holding in *Pennsylvania Coal*, the judgment below must be reversed.

In order to distinguish *Pennsylvania Coal*, respondents assert that this Court "assumed" that the Kohler Act "prevented profitable coal mining," Resp. Br. 56. Thus, respondents conclude that if petitioners can operate "profitably" despite Section 4, then *Pennsylvania Coal* constitutionally permits the State to order millions of tons of coal to be abandoned by petitioners in order to serve the public interest. This reading of *Pennsylvania Coal* is manifestly incorrect. Nowhere in the *Pennsylvania Coal* opinion did the Court discuss the "profitability" of the Pennsylvania Coal Company's mining operations.³

² Neither respondents nor their *amici* discuss at all the legislative history of the Bituminous Coal Act, which clearly indicates that the legislature intended to replicate the Kohler Act. Pet. Br. 22 n.25.

³ Instead, the Court merely referred to the impracticability of mining *certain* coal, which was no more than a restatement of the point which had been made by the dissenting justice of the Pennsyl-

Pennsylvania Coal would hardly be a landmark decision if, as respondents argue, it authorized government to "take" by regulation all the property it wishes so long as it does not lead to the "financial ruin" or to the "impending bankruptcy" of the property owner. Resp. Br. 34. Fairly read, *Pennsylvania Coal*'s holding that the Kohler Act was unconstitutional cannot be distinguished from this case on the basis of its impact on petitioners' property rights.⁴

Moreover, respondents' analysis of why Pennsylvania's 50 percent requirement does not constitute a taking under the more recent decisions of this Court is clearly wrong. It amounts to an argument that the states can lawfully take a little bit of property without compensation, so long as the ultimate effect of taking is not economically devastating measured against the property owner's assets. Respondents have admitted that under the 50 percent rule actual, identifiable coal has been, is being and will be left in the ground solely to advance the State's effort to promote its tax base and to encourage economic development. Resp. Br. 2, 9. But respondents argue that as a percentage of the coal industry's total coal reserves, the amount the State requires petitioners to abandon is relatively insignificant. But this cannot be the proper standard. Neither the overall financial health nor the overall

vania Supreme Court that "it is just as certain as anything can be that one-fourth to one-third of the coal must remain in place for surface support, for the coal owner, under the Kohler Act, will scarcely provide artificial support, by concrete or stone pillars, or otherwise at a cost greatly exceeding the value of the coal." Transcript of the Record at 84, *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).

⁴ Respondents and their *amici* also attempt to "distinguish" *Pennsylvania Coal* on the ground that Section 4 serves broader purposes. As we explained in the opening brief and discuss subsequently, however, this does not distinguish *Pennsylvania Coal*; it is simply a direct challenge to the holding in that case that the magnitude of the state's interest is irrelevant. A taking is measured solely by whether the impact of state law on the individual's property is "excessive." See pages 9-10, *infra*.

holdings of a corporation or individual is relevant to the issue of whether a particular piece of property has been taken. Under respondents' reasoning, if General Motors owned 15 plants, Pennsylvania could simply seize one of them without compensation and it would not be a taking because GM still would have sizable holdings and still remain profitable.

The effect of respondents' implementation of Section 4 on petitioners can be seen by analyzing the relationship between surface owners and subsurface owners as analogous to the relationship between adjoining property owners. If the state were to compel the owner of Blackacre to grant the owner of Whitacre a perpetual surface easement across Blackacre so as to enhance the development of Whitacre and the state's tax base, the owner of Blackacre would have to be compensated for the taking. So too should the owner of the subsurface property be compensated when the State grants the surface owner an easement of support.

B. Because *Pennsylvania Coal* is clearly controlling, respondents and their *amici*, with varying degrees of explicitness, ask this Court to overrule the *Pennsylvania Coal* decision.⁵ But they make no serious attempt to rebut our submission that the important principle of *stare*

⁵ See Pa. Grange Br. 35 ("[A]mici urge this Court to overrule *Mahon*"); NCSL Br. 16 ("[A]mici urge the Court to clarify" the law) (emphasis added); Resp. Br. 53 (petitioners' "analysis ignores . . . the Court's treatment of *Pennsylvania Coal* in subsequent opinions . . .").

⁶ The Attorneys General's *amicus* brief (AG Br. 3 n.2) asserts that *Pennsylvania Coal* did not mean what it clearly said when it held that excessive regulation can constitute a "taking" of property. See also NCSL Br. 14. They argue that the Court's discussion of the Takings Clause was merely a "metaphor" and did not represent a holding based on the Takings Clause itself. Justice Brennan in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 649 (1981) (dissenting on procedural holding), provided a complete answer to this argument: "In addition to tampering with the express language of the opinion, this view ignores the coal company's repeated claim before the Court that the Pennsylvania statute took its property without just compensation."

decisis should be followed in this case. Indeed, they do not even mention the doctrine. This Court, of course, overrules its prior decisions only upon a showing that a holding has caused severe social problems and is demonstrably incorrect in light of subsequent developments. Pet. Br. 22-27. Neither of these criteria is remotely satisfied in this case.

1. Neither respondents nor their *amici* demonstrate any adverse social consequences that have resulted from *Pennsylvania Coal*'s narrow limitation on state and local efforts to regulate property rights. The brief of the Attorneys General claims that striking down the re-enacted Kohler Act "would seriously impair the ability of these states and their political subdivisions to carry out their diverse police power responsibilities." AG Br. 1. However, they make no effort to explain how, in the 65 years since it was decided, *Pennsylvania Coal* has "impaired" the states' ability to further the public interest. Moreover, they do not explain why, out of all the states in which coal is mined, only Pennsylvania has found it appropriate or necessary to require coal operators to forfeit millions of tons of coal to further the state's purported interests in economic development.⁶ Thus, the Attorneys General's factual "presentation has fallen far short of meeting the heavy burden of persuading [this Court] to abandon settled principles," underlying the doctrine of regulatory takings. *United Automobile Workers v. Brock*, No. 84-1777, slip op. at 15 (June 25, 1986).

2. Respondents repeatedly refer (Resp. Br. 14, 22, 53) to undefined, legal "developments" since *Pennsylvania*

⁶ The Attorneys General repeatedly discuss (AG Br. 1, 2, 3, 13) the safety considerations that allegedly are served by the latter-day Kohler Act. Although the particular state interest asserted makes no constitutional difference if the "regulation goes too far," it is worth noting that the courts below held and respondents themselves argue that the statute was designed to further the State's interest in economic development and taxation, and not health and safety concerns. See Resp. Br. 2. Moreover, common sense compels recognition that in any coal producing state a restriction on coal production impedes economic development.

Coal, thus implicitly suggesting that this Court already has abandoned *Pennsylvania Coal*. But as we explained in the opening brief, this Court has cited these principles and the *Pennsylvania Coal* decision in virtually every takings case decided in the last ten years. Pet. Br. 22-23 and n.27. Moreover, the Court has not indicated any intention in any opinion to depart from *Pennsylvania Coal*, and instead has referred to *Pennsylvania Coal* as the "leading case" on the issue of regulatory takings. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978).⁷ Respondents' reliance upon 65 years of case law as a basis for overruling *Pennsylvania Coal* is therefore misplaced.

C. Rather than argue directly that *Pennsylvania Coal* should be overruled, amici Attorneys General and NCSL merely propose different legal standards which they argue should be applied to regulatory "takings" cases and which would emasculate the regulatory takings doctrine. Neither test is supported by any prior decisions of this Court.

The Attorneys General's proposal is clearly the most extreme. They argue that state laws "enacted to prevent harm to the public cannot—as a matter of law—constitute a taking." AG Br. 11.⁸ In advancing this pro-

⁷ Respondents, their amici and the courts below all treated the standards in *Penn Central Transportation Co. v. New York City*, 438 U.S. at 127, as though they were talismanic. But those factors—the nature of the government's action, the economic effect of the regulation and its effect on distinct investment backed expectations—are intended only as a useful starting point in any takings analysis. The factors are designed to assist in making the ultimate determination under *Pennsylvania Coal* whether the regulation at issue has gone "too far." This Court already has made that determination with respect to the Pennsylvania statute and regulation. The "physical restriction against the removal of the coal" in the identical statutes of 1921 and 1966 constitutes a taking and nothing in any decision of this Court since 1922 suggests to the contrary. *Andrus v. Allard*, 444 U.S. 51, 66 n.22 (1979).

⁸ The Attorneys General make no attempt to explain how a court is supposed to decide when the state is "prevent[ing] harm" which it can do without just compensation and when the state is "secur[ing] a public good" for which it must pay compensation.

posal, the Attorneys General in effect concede that their proposal for a *per se* rule is flatly inconsistent with the *Pennsylvania Coal* holding and also with the "ad hoc, factual inquiry" required in all cases by *Penn Central Transportation Co. v. New York City*, 438 U.S. at 123-124. AG Br. 12. Moreover, contrary to their assertion, no cases either before or after *Pennsylvania Coal* support the public harm/public benefit distinction advanced by the Attorneys General. Even the relatively old cases cited by the Attorneys General, such as *Mugler v. Kansas*, 123 U.S. 623 (1887), only permitted the state to eliminate *one use* for property that could be put to other, albeit less profitable, uses. The Court has never adopted a rule granting the state absolute regulatory power over an individual's property simply because one use creates a public nuisance. Thus, *Mugler* did not lose his land or his building, only his right to operate a brewery.⁹

This case is fundamentally different from *Mugler*. As this Court pointed out in *Pennsylvania Coal*, "[f]or practical purposes, the right to coal consists in the right to mine it." 260 U.S. at 414. Accordingly, the argument of the Attorneys General (AG Br. 21) that an absolute prohibition on all mining would not be in violation of the Constitution because petitioners would retain the right of "access" to the coal and the right to "ventilate the mine shafts" is wholly unrealistic. It also shows how

AG Br. 5. In this case, the courts below held that the state is clearly attempting primarily to advance economic interests in increased taxation. The Attorneys General nevertheless do not discuss how this interest prevents a public harm. *Id.*

⁹ Similarly, in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), the Court did not hold that all valid exercises of police power are immune from a takings claim; it simply held that where the property interests affected could be used for some other purpose which was not regulated, there was no taking in the constitutional sense. By contrast, petitioners do not own the surface overlying their coal property and coal property hundreds of feet below the surface has no use or value if it cannot be mined. Because the restriction imposed by the State here is absolute, within the meaning of *Pennsylvania Coal*, the regulation is unconstitutional.

clearly their position is contrary to *Pennsylvania Coal's* protection of private property rights. Why would any mine owner want "access" to coal he cannot mine, or go to the expense of ventilating a shaft in a mine from which there will be no income?

This is not a case like zoning or historic preservation where the state's action merely reduces the economic value of the property. Compare *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Pennsylvania is compelling the petitioners to abandon permanently 30 million tons of coal in the ground, which it left unmined has no value. Pet. Br. 4. The State is not regulating land use; it is taking property for a public purpose.

The NCSL argues (NCSL Br. 9) that the Takings Clause should be construed exclusively as an eminent domain provision and, as such, does not impose any restrictions upon land use regulations, which are an exercise of the state's police powers. The fundamental flaw in this reasoning is that it would require the Court to overrule not only *Pennsylvania Coal*, but also many other precedents. This Court long ago rejected the idea that the Takings Clause is only an eminent domain provision. The Court emphatically rejected the NCSL's suggestion well over 100 years ago in *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177 (1872), when it said: "It would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely . . . because in the narrowest sense of that word, it is not taken for the public use." This holding is fully consistent with the language and purpose of the Takings Clause (See Pet. Br. 24-26) and no reason, other than the NCSL's members' unilateral hope to be free of reasonable constitutional restraints on their police powers, is presented to depart from this settled principle.¹⁰

¹⁰ The NCSL describes the relevant test as being whether the State has acquired a "proprietary interest" in the property. How-

D. In our opening brief, we explained that the fatal error committed by the court of appeals was its holding that, even if the state's regulation of property rights is "excessive," it nevertheless can be upheld against a *Pennsylvania Coal* takings claim if the state seeks to further a legitimate interest. The Court clearly rejected this argument in *Pennsylvania Coal*. Moreover, in *Penn Central* the Court adopted a three-part test which focuses solely on the extent of the injury to property. There is simply no basis in law or logic for considering the importance of the state's interest after a court has properly determined that the challenged regulation has gone "too far" and constitutes a "taking."

The Attorneys General argue vehemently (AG Br. 23-25) that this Court's focus in *Penn Central* on the "character of the governmental action" includes an inquiry into the state's interest in taking the property, which if strong enough can justify an uncompensated regulatory taking of private property. But just last Term, this Court again made clear that the first factor listed by the Court in *Penn Central*—character of the governmental action—is limited to whether the government "physically invade[s] or permanently appropriate[s]" the individual's property. *Connolly v. Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018, 1026 (1986).

What the respondents and the Attorneys General ignore in their analysis of this Court's decisions since *Pennsylvania Coal* is that those cases all involved a restriction upon particular uses of property. In this case, just as in *Pennsylvania Coal*, the restriction eliminates petitioners'

ever, none of the other non-eminent domain takings cases cited by NCSL can be squared with this standard. In *Pumpelly*, the state did not obtain any more or less of a property interest in the land it flooded than Pennsylvania has obtained in the coal it has ordered left in the ground to protect the state's tax base. Similarly, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the City acquired no formal property interest. As in this case, it simply treated the individual's private property as though it did belong to government. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

distinct property interests. The Court therefore need not undertake an extensive analysis of the regulatory action to decide if its effect crosses the line and is a taking. That determination was made in *Pennsylvania Coal* and nothing in the 65 years since that decision constitutionally authorizes the State of Pennsylvania to re-enact the Kohler Act.¹¹

Contrary to the assertions of the respondents and the Attorneys General, petitioners' theory is really quite narrow. We do not argue that property is absolutely protected from reasonable regulation and we certainly do not claim that private individuals cannot be required to pay for tortious injuries they commit. Thus, absent prior contractual arrangements, the Takings Clause does not prevent the State from requiring coal operators to pay for actual subsidence damage caused by an operator's negligence. Such a tort action involves simply an adjustment of private rights identical to the statute in *Connolly*, 106 S. Ct. at 1026. But that is not what Pennsylvania is doing. In order to serve the State's interest in economic development, it is compelling coal operators to abandon coal in the ground. This is precisely the kind of burden that should not be imposed on the single property owner, but instead, as a matter of equity and fairness, should be shared by taxpayers in general.

¹¹ The Court also held in *Pennsylvania Coal* that the restrictions in the Kohler Act abolished the support estate, which is a separate "valuable" property interest recognized by Pennsylvania law. 260 U.S. at 414. In this case, respondents completely distort the decisions below by asserting that they represented an "interpretation" of state law with respect to the meaning of the support estate. Resp. Br. 15, 43-44. The opinion of the court of appeals, however, does not contain any analysis of state law. Instead, the court expressly held that it could ignore state-defined property rights: "To focus upon the support estate separately . . . would serve little purpose" Pet. App. 15a. Respondents cannot rewrite the opinion below to avoid the clear error of failing to follow the state's definitions of property as required by this Court's "takings" cases. See Pet. Br. 30 and cases cited therein.

E. The best evidence that *Pennsylvania Coal* cannot be meaningfully distinguished from this case is the vigor with which respondents and their *amici* argue that the Court, on procedural grounds, should avoid deciding the takings issue altogether. Resp. Br. 26-52; NCSL Br. 16-22; AG Br. 18-22. But, unlike recent land use cases where this Court has declined to decide whether a taking has occurred because the effect of the regulation could not be ascertained, there can be no question that millions of tons of petitioners' coal is being and has been "taken" in a constitutional sense pursuant to Section 4 of the Bituminous Coal Act and its implementing regulations.

Respondents and *amici* argue that this Court has adopted an absolute rule that "takings" claims cannot be adjudicated on a classwide basis, but must be litigated property owner by property owner and parcel by parcel. None of the briefs attempt to explain the basis for this peculiar rule and it clearly makes no sense as applied to this case.

Respondents and their *amici* describe the issue in terms of ripeness, which is allegedly a problem because this lawsuit involves a "facial" attack on the regulation. The Attorneys General and the NCSL assert that this case is like *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). But that case involved a *pre-enforcement* challenge to the regulation and the Court held that it could not determine whether challenged restrictions on post-mining activities would significantly affect the coal operators' ability to mine their coal. 452 U.S. at 264-265. It therefore concluded that the issue was not ripe.

Unlike their *amici*, respondents themselves acknowledge that because "the regulations have been in force for some time, . . . there is some evidence of the impact of the regulations" and that "[i]t is possible, therefore, to assess at a level somewhat deeper than that available in *Hodel* the impact of the program . . ." Resp. Br. 37. Their analysis, in effect, concedes that the petitioners' claim

is ripe for review. Moreover, the Court need not guess about the impact of the statute and regulations on petitioners' coal rights—30 million tons of coal are or will be dedicated to the public good solely because of the State's law. Thus, unlike *Hodel*, where the statute challenged on its face did not "prevent beneficial use" of any property, the injury in this case caused by the statute is both real and immediate.

Indeed, the record is crystal clear. Respondents have enforced the 50% rule against petitioners in thousands of specific cases (J.A. 90, 145) and have expanded the scope of the rule to restrict coal extraction beneath other surface features. (25 Pa. Admin. Code § 89.145). As respondents and their *amici* would have it, petitioners would be compelled to violate the law and be subjected to heavy civil penalties and cessation orders (52 Pa. Cons. Stat. Ann. §§ 1406.6, 1406.9, 1406.17 and 1406.17a) or wait for bankruptcy to secure relief from identical government action proscribed by this Court 65 years ago.

There is no uncertainty as to the impact of this law on these petitioners. The adverse effects have already been felt and their dollar value increases with each passing day. Whenever petitioners' mining occurs beneath a protected structure, they must leave coal in the ground that they would not leave in any state other than Pennsylvania. No one disputes that this is happening now, and will continue to happen until these petitioners' constitutional rights have been vindicated.

In short, the ripeness doctrine counsels against deciding a case when injury may or may not occur in the future. Here, the damage is irretrievable; it has already occurred and continues each day.

NCSL also argues (NCSL Br. 20) that takings claims cannot be litigated "until administrative action is final." But that rule applies only to cases involving zoning restrictions where it is impossible to evaluate the effect of the zoning action until the regulatory body finally decides the extent of permissible development on the individual's

property. See, e.g., *MacDonald, Sommer & Frates v. Yolo County*, No. 84-2015 (June 25, 1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108 (1985); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Such an argument is not relevant here; respondents admitted in their answer that the petitioners could never make a factual showing sufficient to permit them to obtain an administrative waiver of the 50 percent requirement when they plan to use full extraction techniques, which all petitioners utilize. J.A. 28, 295. Thus, for purposes of the litigation, the state agency has finally acted on all of petitioners' coal, and 30 million tons of it will remain in the ground pursuant to state law.

Respondents argue (Resp. Br. 34-35) that this Court should not decide the case because it is in an interlocutory stage in the litigation. This is a somewhat curious argument for respondents to make since they joined in the request before the district court to certify the issue for interlocutory appeal. J.A. 10. In any event, the fact that other, unnecessary issues still remain is no reason not to decide now the discrete issue that has been finally decided below, *viz.* whether under *Pennsylvania Coal*, the state's statute and regulations effected a taking of petitioners' property.

Finally, the Court does not need a parcel-by-parcel analysis to find that petitioners' coal has been taken.¹² The Court already held in *Pennsylvania Coal* that this identical restriction constitutes a taking. Thus, an elaborate factual analysis of the *Penn Central* tests is unnecessary in this case. The undisputed effect of Section 4 is precisely the same as if the State ordered petitioners to

¹² One strong reason why a parcel-by-parcel analysis might be warranted in other cases is because the property owner is seeking compensation. Petitioners requested only injunctive relief in order to avoid the expense of individualized judicial determinations in at least 14,000 cases. J.A. 90.

deliver 30 million tons of coal to be used as pillars in a modern development project that was designed to attract new investments into the State and to improve the State's tax base. The Court recognized as much in 1922 and declared this law's identical predecessor unconstitutional. The State has once again attempted to "take" coal property for a public use without compensation and therefore is again violating the Fifth Amendment.¹³

II. THE CONTRACT CLAUSE

By their perfunctory analysis of fundamental constitutional issues, respondents virtually concede that the court of appeals applied the wrong standard of Contract Clause review and that Section 6 of the Bituminous Coal Act unconstitutionally impairs the obligations of contract.

A. Respondents explicitly concede that review of Section 6's validity is required because it destroyed contract rights (Resp. Br. 83):

The coal companies possess waivers of liability for surface damage caused by subsidence; but as a result of the subsidence control program, they now may not rely on those waivers if certain structures are damaged by subsidence.¹⁴

¹³ Curiously, respondents express some doubt (Resp. Br. 6 n.3) about whether petitioners are challenging as a taking only the statute or also the regulations implementing the statute. Petitioners' complaint clearly challenged both Section 4 of the Act and the 50 percent requirement implementing the statute contained in 25 Pa. Admin. Code § 89.146. J.A. 28. That requirement applies to all protected structures designated by Section 4 of the Act and by 25 Pa. Admin. Code § 89.145. J.A. 28. These provisions have been attacked throughout the litigation because they effect a taking of petitioners' coal without just compensation. Accordingly, it is petitioners who are left to wonder how respondents could be confused about this issue.

¹⁴ Respondents subsequently contradict themselves and claim that, although Section 6 completely nullifies petitioners' contract rights as a matter of law, this impairment is not so severe as a matter of "fact." Resp. Br. 90-92. But respondents "factual" points are either demonstrably irrelevant to the impairment question (Section 6 does not apply to all land over petitioners' mines, *id.* at 90) or clearly

B. Respondents' primary argument is that the "reasonable and necessary" test established by this Court under the Contract Clause (Pet. Br. 36-43) should not apply to Section 6's severe impairment of petitioners' private contract rights. Resp. Br. 84-89. Respondents' analysis is, however, replete with errors and telling omissions.

Respondents concede (Resp. Br. 81, 89) that the "reasonable and necessary" test which applies to impairments of *state* contracts is much more stringent than the mere rational relationship test required when state economic regulation is challenged under a substantive due process theory. But respondents fail to reply to petitioners' arguments (Pet. Br. 33-34, 44-45) that the text, history and logic of the Contract Clause require comparable judicial scrutiny of laws *severely* impairing private contracts and laws impairing state contracts.¹⁵

Respondents also ignore or misread this Court's recent Contract Clause decisions. No modern decision of this Court has sanctioned the complete destruction of private contract rights presented by this case. Pet. Br. 42-44. In a number of cases handed down after the Court's seminal decision in *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934), the Court has established the "reasonable and necessary" test as the proper means for reconciling the fundamental tension at the core of the Clause between protecting the reliance interests of the parties

underscore that severe impairment has occurred (petitioners' waivers of liability "make it easier, or sometimes possible, to extract the coal," *id.* at 92).

¹⁵ Indeed, although the Court in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), applied the Contract Clause to public contracts, that application was less clearly what the framers intended than their unequivocal desire to protect private contract rights. See generally, D. Currie, *The Constitution in the Supreme Court: The First One Hundred Years 1789-1888*, 134-136 (1985). A less stringent standard of Contract Clause review for laws severely impairing private contracts than for laws impairing state contracts thus cannot be justified by either the text or history of the Clause itself.

to private contracts while allowing states sufficient latitude to modify contractual rights to deal with major, unforeseen developments. *Id.* at 43, n.53 & n.54. Except for *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), respondents fail even to discuss any of these cases let alone rebut petitioners' analysis of them.

With respect to *Spannaus*, respondents acknowledge its fundamental rule that the severity of the impairment of private contract rights measures the height of the hurdle the impairing state law must clear. See Pet. Br. 37. But respondents then distort the rule and claim that, with respect to severe impairment of private contracts, courts should only look generally at the purpose of the impairing law. Resp. Br. 84-88. Otherwise, courts should give no weight to executed contract rights and should completely defer to the state's definition of the problem requiring a legislative response and its decision about the means employed. But this reading of *Spannaus* is demonstrably wrong. First, *Spannaus* expressly relied upon *Blaisdell*, which established the modern method of Contract Clause analysis, and upon two post-*Blaisdell* decisions which struck down state laws impairing private contracts using elements of the "reasonable and necessary" test.¹⁶ *Spannaus*, 438 U.S. at 242-44, 250. Second, this Court in *Spannaus* applied that more searching test in invalidating a modification of a private employer's pension fund obligation.¹⁷

¹⁶ See *Worthen Co. v. Thomas*, 292 U.S. 426 (1934) and *Treigle v. Acme Homestead Ass'n*, 297 U.S. 189 (1936).

¹⁷ For example, *Spannaus* clearly stated that when there was a severe impairment of private contract rights the "presumption favoring" legislative judgment "simply cannot stand," 438 U.S. at 247. The Court carefully examined not just the purpose of the law but whether the law imposed only the burden on contract rights minimally necessary to accomplish state goals. See Pet. Br. 29-41 & n.43. See also Resp. Br. 87 (quoting from *Spannaus* but ignoring the word "necessary"). In any event, respondents do not even satisfy their view of the test used in *Spannaus*. See pp. 19-21, *infra*.

Like the court of appeals, respondents also erroneously rely on this Court's decision in *Energy Reserves Group, Inc. v. Kansas*

Because their arguments lack support in the constitutional text, in history and in precedent, respondents can only make vague and unsupported policy arguments against certain elements of the "reasonable and necessary" test. Respondents criticize the first element of the test—that the state must show that the impaired contract had consequences which are creating significant problems unforeseen at the time the contract was executed. See Pet. Br. 28. They argue that "[a] problem generally might be foreseeable, but the magnitude and the precise effect of the problem, . . . may not become apparent until many years later." Resp. Br. 99. But, if the "magnitude" or "effect" of a problem were unforeseen, then under this Court's decision, a state could satisfy this element of the test. If, however, there are no unforeseen consequences and the state legislature has simply decided to regulate in a new area and to enact a law upsetting the reliance interests of the contracting parties, then such a change in majority opinion cannot alone justify abrogation of contract rights protected by a strongly worded, express provision of the Constitution. Contrary to respondents' further contention, a state does not lose the power to regulate if there are no significant and unforeseen consequences because there are usually many alternative means for achieving legislative goals other than severe impairment of contract.¹⁸ *Id.*¹⁹

Power & Light Co., 459 U.S. 400 (1983), for their deferential test. But respondents fail even to address petitioners' arguments that *Energy Reserves* did not remotely purport to overrule the *Blaisdell-Spannaus* "reasonable and necessary" test. *Energy Reserves*' basic holding was that there was no impairment of contract. Even if there were an impairment, the Court held that the impairment was minimal, thus triggering only limited judicial scrutiny. Pet. Br. 41-42.

¹⁸ Respondents mistakenly cite certain Nineteenth Century cases—e.g., *Stone v. Mississippi*, 101 U.S. 814 (1880) and *Boston Beer Co. v. Massachusetts*, 97 U.S. 25 (1878)—for the proposition that the ultimate Contract Clause standard of review does not require a state to show unforeseen consequences of contract. Resp. Br. 99. See also, AG Br. 27. But these cases do not address the "reason-

Similarly, respondents object to the "necessary" element of the test, which requires that a state must carefully tailor the impairing law to the important problems it was designed to meet and do no more injury to contract rights than necessary to achieve its goals. Pet. App. 39-41. Respondents weakly object that "it makes sense, both from a practical and institutional standpoint, for the Court to defer in large measure to legislative choices . . ." Resp. Br. 88. But the missing word in that sentence is "constitutional." Supine deference to state legislatures is neither required nor appropriate when obligations of contract protected by an express provision of the Constitution are extinguished. The "necessary" (or "appropriate") requirement ensures that states will proceed with care and caution before upsetting the obligations of contract. This Court's post-*Blaisdell* decisions—especially *Worthen v. Thomas*, *Treigle v. Acme Homestead Ass'n* and *Spannaus*—demonstrate that states must strike a considered balance between police power concerns and legitimate contract rights before a severe impairment of contract will survive Contract Clause scrutiny. See Pet. Br. 42-44.

C. Given the nearly complete absence of relevant legislative history, respondents make no serious attempt to

able and necessary" test which a state must satisfy before a state law impairing private contracts can be constitutional. For example, *Stone* and *Boston Beer* stand for the proposition that a state itself cannot, under the so-called "reserved powers doctrine," enter into a binding contract not to exercise its police power in the future. See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23, n.20 (1977). Thus, they are not applicable to state laws impairing contracts between private parties.

¹⁹ Further, even if a state could not satisfy the "reasonable and necessary" test and had no alternative but to impair contract rights, it could still act. A state can nullify contract rights if it is willing to pay for such "takings" by providing "just compensation." See, e.g., *Contributors to Pennsylvania Hospital v. Philadelphia*, 245 U.S. 20 (1917); *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685 (1897) (contract rights are property for purpose of "takings" analysis).

rebut petitioners' demonstration that Section 6 does not pass constitutional muster under the Contract Clause's "reasonable and necessary" test.

Petitioners argued that the state had failed to show that the contractual provisions at issue had created significant problems of public policy unforeseen when the contracts were executed. Pet. Br. 45. Respondents do not address this precise contention directly, but merely point to the legislature's general findings about how mine subsidence has impeded land development and eroded the tax base. Resp. Br. 99-100. These general findings—which buttress the general legislative goal of *preventing* future subsidence—are absolutely silent on the relevant constitutional question of why contracts allocating the cost of repairing subsidence damage must be overridden. There are no findings on whether subsidence damage is repaired, why it was not (if it was not), or how these patterns differed from earlier expectations.

Nor do respondents answer petitioners' submission that Section 6 was not "reasonable in light of changed circumstances" under the *Blaisdell-Spannaus* criteria. Pet. Br. 46. For example, respondents cite nothing in any legislative materials to indicate that a clear purpose of the Bituminous Coal Act was to address significant problems arising from lack of *repair* of subsidence damage. Instead, they state repeatedly that the purpose of the Act was to *prevent* further subsidence damage. Resp. Br. 2, 96, 98, n.22.²⁰ Thus, respondents have not shown that destroying contract rights and shifting the costs of repairing subsidence damage to mine operators was intended to address a broad, generalized social or economic

²⁰ Respondents merely assert that a purpose of the Act is to *repair* damage, but this claim is completely unsupported. Resp. Br. 94. Similarly, respondents speculate about the possible beneficial effects which might result from shifting the cost of repair to the mine operators. *Id.* at 94-96. But this pure conjecture of counsel has no constitutional significance because it is not based on the text of the statute, its legislative history or any other legally relevant material.

problem. Moreover, respondents do not even attempt to show that the other Contract Clause "reasonableness" criteria are satisfied.²¹

Section 6 also does not satisfy the "necessary" element of the Contract Clause test because the State legislature failed to analyze—or make findings on—why the State's insurance program was not an adequate alternative approach to repairing subsidence damage which was less destructive of executed contract rights. Pet. Br. 46-48. Respondents do not dispute petitioners' actual description of that insurance program. Instead, respondents can only claim weakly that a single, general sentence in the legislative findings—which does not mention the repair of structures or the insurance program—constitutes adequate legislative consideration of alternatives to Section 6. Resp. Br. 98. But this sentence, on its face, fails to satisfy the "necessary" element of the test, especially given respondents' concession by their silence that the established insurance program, with its relatively low premiums, affords landowners an alternative method of paying for repair of subsidence damage. Pet. Br. 47-48.

In short, respondents have failed to show that Section 6 satisfied any of the elements of the "reasonable and necessary" test. Accordingly, under the appropriate Contract Clause standard of review, Section 6 is invalid.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

²¹ Respondents are unable to rebut petitioners' argument that the legislative findings are completely silent on whether—or how—Section 6 protects a broad societal interest rather than a narrow class of surface owners. Respondents do not even attempt to answer petitioners' submission that a third criterion of reasonableness—that the impairing law operated in an area subject to state regulation—is not satisfied by Section 6. Respondents cannot contend that a fourth criterion—that the impairing law be of limited duration—is satisfied by Section 6. Thus, none of the *Blasidell-Spannaus* heightened "reasonableness" criteria are satisfied by Section 6.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Petitioners,
v.
PETER S. DUNCAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS,
KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*

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BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS,
KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of petitioners, Keystone Bituminous Coal Association, Helvetia Coal Company, Rochester & Pittsburgh Coal Company, U.S. Steel Mining Co., Inc., United States Steel Corporation, and Consolidation Coal Company. Consent to the filing of the brief has been obtained from counsel for all parties and copies of these letters have been lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt, public interest law firm with over 19,000 contributors and supporters located throughout the United States. Established in 1973, PLF has been actively engaged in research and litigation over a broad spectrum of public interest issues and has frequently concentrated on one of the most fundamental constitutional tenets—the protection of private property rights.

Policy for PLF is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only when it concludes that PLF's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of this brief to support its belief that the exercise of a state's police power does not go so far as to allow unbounded restrictions on property rights. A state's attempt to use its police power in an excessive manner serves to deprive landowners of their property in contravention of the Due Process Clause of the Fourteenth Amendment.

INTRODUCTION

The Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, 52 Pa. Cons. Stat. Ann. § 1406.1, *et seq.* (Purdon Supp. 1984-85) (Subsidence Act), prevents any bituminous coal operator from mining coal in such a way as to cause subsidence of certain protected surface structures such as dwellings used for human habitation and public buildings. *Id.* at § 1406.4 (Section 4). In addition, mine operators are required to repair or pay damages for any subsidence which does occur under those structures. *Id.* at § 1406.6 (Section 6). Subsidence is the lowering of the strata overlying a coal mine because of underground coal extraction and is the inevitable result of coal mining operations. The Pennsylvania legislature enacted the Subsidence Act after finding that sub-

sidence damage to surface structures endangered the health, safety, and welfare of the citizens of the Commonwealth. The legislature also found that subsidence had impeded land development in the state and had eroded municipal tax bases. *Id.* at § 1406.3. *See generally, Keystone Bituminous Coal Association v. Duncan*, 771 F.2d 707, 709-11 (3d Cir. 1985).

Sections 4 and 6 of the Subsidence Act apply regardless of whether the owner of the coal also owns the right of support. As the court below acknowledged, Pennsylvania law recognizes three estates in land: the surface estate, the mineral estate, and the support estate. The support estate is the right which, when owned by the surface owner, entitles that owner to absolute support of the surface estate. When the support estate is owned by the mineral owner, however, it allows that owner to exploit the minerals without regard to surface damage from subsidence. The Pennsylvania Subsidence Act thus effectively extinguishes a previously recognized property interest—the support estate.

Petitioners, Keystone Bituminous Coal Association, *et al.*, brought a challenge to the Subsidence Act on two constitutional grounds: (1) that the Act effected a "taking" of property (the support estate, as well as the coal which must be left in place to prevent subsidence) in violation of the Fifth Amendment, and (2) that the Act interfered with contractual obligations in violation of the Contracts Clause, Article I, Section 10. Upon certification from the District Court, the United States Court of Appeals for the Third Circuit upheld the constitutionality of the Subsidence Act. A petition for a writ of certiorari was timely filed with this Court, and was granted on March 24, 1986.

SUMMARY OF ARGUMENT

Petitioners argued below that the Subsidence Act, which completely eliminates the support estate recognized by Pennsylvania law, effects a taking of private property in contravention of the Fifth Amendment. A preliminary inquiry, however, must be whether the statute is in fact a valid use of the state's police power.¹ Amicus PLF submits that the Act represents an improper exercise of the police power and consequently denies to affected mineral estate owners their substantive due process rights guaranteed by the Fourteenth Amendment.

While the state legislature in enacting the Subsidence Act made reference to the public's interest in preserving land, the primary beneficiaries of the Act are a small group of private parties—surface owners who do not possess support rights. The limited public interest invoked by the state legislature is not sufficient to justify the substantial interference with the protected property rights of the mineral owners. Moreover, the method the legislature chose to address its concerns creates an unnecessary

¹ An otherwise valid police power regulation can effect a Fifth Amendment taking when the regulation "goes too far" with respect to interference with property rights (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)), and denies to the property owner the economically viable use of the property (*Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 138 n.36 (1978)). The appropriate remedy for such a taking is the payment of just compensation. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 653 (1981), Brennan, J., dissenting. A land use regulation which goes beyond the inherent police power of the state, however, violates the Due Process Clause of the Fourteenth Amendment. See *Nebbia v. State of New York*, 291 U.S. 502, 525 (1934). Where such an invalid regulation also serves to deny a property owner the economically viable use of his or her property, the offending statute is unconstitutional under both the Due Process Clause of the Fourteenth Amendment and the Fifth Amendment. Thus, the invalidation of a statute on due process grounds would not foreclose an injured party from claiming monetary damages for the denial of the use of the property during the period of time when the invalid statute was in effect.

and unreasonable imbalance between the burdens imposed under the statute and accrued benefits. In sum, the Subsidence Act represents an abuse of official power and cannot meet the dictates of the Due Process Clause.

ARGUMENT

DUE PROCESS REQUIRES THE REASONABLE AND RATIONAL USE OF A STATE'S POLICE POWER IN THE REGULATION OF PROPERTY INTERESTS

The Due Process Clause of the Fourteenth Amendment prohibits a state from "depriv[ing] any person of life, liberty, or property without due process of law." This section has been held to confer not only procedural rights (*e.g.*, notice and a hearing) when a protected interest is detrimentally affected, but also *substantive* rights when a state attempts to impose restrictions on a protected interest. See *Kelley v. Johnson*, 425 U.S. 238, 244 (1976).

The concept of substantive due process, then, serves as a limitation on the exercise of a state's power to further public interests at the expense of private interests. Specifically, due process demands a showing "that the interests of the public . . . require such interference; and . . . that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." *Lawton v. Steele*, 152 U.S. 133, 137 (1894), quoted in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962). Under this analysis, the Subsidence Act is an excessive use of the police power which cannot be sustained in accordance with due process.

A. A Statute Which Actually Protects Only Narrow Private Interests By Divesting Property Owners of a Property Right Does Not Comport With Due Process

While the Court of Appeals found the Subsidence Act to be based upon the public's interest in preserving the land and protecting the tax base, it cannot be denied that the primary and immediate beneficiaries of the Act are

surface owners who have contracted away their support rights or who purchased land without subjacent support. The protection of only these private interests, however, cannot be used to justify the nullification of recognized property rights.

The Court's analysis in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), is particularly relevant here, given the factual similarities between the 1921 Kohler Act at issue there and the Subsidence Act challenged in the case at bar. Like the Subsidence Act, the Kohler Act forbade the mining of coal so as to cause subsidence of, among other things, structures used for human habitation and public buildings. The earlier act also applied regardless of existing damage waivers or ownership of support rights and thus "purport[ed] to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate" 260 U.S. at 414.

In addressing the asserted public interest behind the Kohler Act, the Court found that the harm the legislature was attempting to avert was a private harm—one which did not amount to a public harm simply because "similar damage is inflicted on others in different places." *Id.* at 413. Moreover, the Kohler Act could not be justified as a safety regulation since the same interest could be met by requiring notice of intent to mine under protected structures. *Id.* at 414. Thus, even affording the legislature's judgment "[t]he greatest weight," the Court was unable to identify in the Kohler Act "a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights." *Id.* at 413-14.²

² In the first part of its decision, the Court in *Pennsylvania Coal Co.* limited its review of the Kohler Act to its impact on defendant's privately owned property. 260 U.S. at 412-14. The Court also felt compelled, however, to address the general validity of the act as it applied to publicly owned property, and further held that "the act cannot be sustained as an exercise of the police power, so far as it

The conclusions reached in *Pennsylvania Coal Co.* are fully applicable to Pennsylvania's more recent effort to deal with subsidence from coal mining operations. While the Subsidence Act claims to be furthering the public's interest in preserving land, the extent of that interest is quite limited since the Act seeks to prevent subsidence only under certain protected structures, not under all landholdings. Indeed, undeveloped property would not be protected from subsidence damage, even though the Act is said to promote development.

Moreover, with respect to preventing subsidence under homes, the legislature is simply protecting private interests, not public ones. The reference to promoting development and protecting the tax base does not transmute the private interest into a public one inasmuch as it is the private surface owner whose interests are protected and advanced in the first instance. Any increased tax revenues to the state are only the outgrowth of the increased value of privately owned surface rights.³ Nor

affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved." *Id.* at 414. Since the public had only those rights in land which it had acquired through the exercise of eminent domain and the public's "representatives have been so short sighted as to acquire only surface rights without the right of support," the Court declined to allow the state to acquire support rights by means of the Kohler Act. *Id.* at 415.

³ The Court of Appeals distinguished the Kohler Act from the Subsidence Act on the ground that the former excluded surface owners who also owned the coal deposits, while the latter excludes no surface owner; this, according to the court, indicates that "the Subsidence Act was intended to . . . preserv[e] surface estates and structures," not to protect private interests. *Keystone Bituminous Coal Association*, 771 F.2d at 715. If indeed the goal of the Subsidence Act were to preserve property, then the legislature's purpose would be better served by requiring surface estate owners without support rights to repair subsidence damage, rather than eliminating the support rights acquired by the mineral estate owners for value.

can the Subsidence Act be justified on the basis of public safety since the less intrusive option of notice of intended mining activities serves the same purpose. See *Pennsylvania Coal Co.*, 260 U.S. at 414.

Similarly, the Subsidence Act's application to mining under public buildings cannot be defended by reference to a public interest sufficient to warrant the elimination of valuable property rights. The public interest apparently did not require the acquisition of support rights when surface estates were acquired, and the legislature has pointed to no new exigencies which might require their acquisition at this time. Should such circumstances arise, the support estates could be obtained with the use of eminent domain and the payment of just compensation, i.e., the same manner in which the surface estates were originally obtained. A mere "public desire to improve the public condition" does not justify the Subsidence Act's infringement of recognized property rights. See *Pennsylvania Coal Co.*, 260 U.S. at 416.

The public interest justification for the Subsidence Act is fragile at best. The Act's interference with private property rights, however, could not be more extreme. Although the Court of Appeals attempted to "bundle" the support estate with the surface and mineral estates (771 F.2d at 716), the fact remains that Pennsylvania law recognizes the support estate as a separate property interest. As such, a support estate can be bought or sold, and even owned by a third party. Montgomery, *The Development of the Right of Subjacent Support and the "Third Estate" in Pennsylvania*, 25 Temple L.Q. 1, 11 (1951). More than a "strand in a bundle" of property rights, a support estate is a valuable property right independent of either the mineral or the surface estate.

The abolition of this property right cannot be justified on the basis of private interests or even a limited public

interest. The Subsidence Act is therefore an excessive exercise of the state's police power in violation of the Due Process Clause.⁴

B. A Statute Which Imposes Substantial Burdens Without Regard to Benefits Obtained Is Inherently Unreasonable

As discussed above, the Subsidence Act serves primarily private interests, with only an incidental impact on public interests. The immediate beneficiaries of this legislation are the surface estate owners who, for consideration, contracted away their support rights or who, presumably with knowledge, purchased a surface estate without subjacent support.

In order to benefit these private interests, however, the Act has imposed all of the burdens on mineral owners who have already paid for the right to mine coal irrespective of surface subsidence damage. The surface estate owners, on the other hand, are made to suffer no detriment or liability in exchange for the valuable assets conferred upon them. Such an unbalanced approach to the goal of preserving surface estates and structures is unreasonable, in addition to being devoid of a substantial public interest.

As recently as its decision in *Connolly v. Pension Benefit Guaranty Corporation*, — U.S. —, 106 S. Ct. 1018 (1986), this Court has indicated that, in order to

⁴ The absence of a strong public interest also has implications under the Contracts Clause of the Constitution, Article I, Section 10. The Subsidence Act substantially impairs the contracts which mineral owners have executed with surface owners to acquire the necessary support rights. A statute which causes such impairment, however, must be able to demonstrate a "significant and legitimate public purpose." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). The Subsidence Act falls far short of this standard.

meet constitutional constraints, a connection must exist between the burdens imposed by a statute and previous benefits achieved. In *Connolly*, withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act (MPPAA) were upheld against a takings challenge. Discussing the economic impact of the act, the Court noted that "[t]he assessment of withdrawal liability is not made in a vacuum . . . but *directly depends on the relationship* between the employer and the plan to which it had made contributions." *Id.* at 1026 (emphasis added). The Court intimated that if an employer's withdrawal liability would "always be out of proportion" to its experience with its pension plan, then the result might be different. *Id.* at 1027. In their concurring opinion in *Connolly*, Justices O'Connor and Powell also addressed due process considerations and concluded that "[o]ur recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational *in the absence of any connection* between the employer's conduct and some detriment to the employee." *Id.* at 1028, citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19, 24-26 (1976) and *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.*, — U.S. —, 104 S. Ct. 2709, 2720 (1984) (emphasis added).

Both *Turner Elkhorn* and *R. A. Gray & Co.* involved Fifth Amendment due process challenges to federal statutes requiring employers to pay into funds for the benefit of past and present employees. Specifically, *Turner Elkhorn* concerned the validity of the Coal Mine Health and Safety Act under which employers were required to provide compensation for injuries to employees due to "black lung disease" or pneumoconiosis. While agreeing that the act imposed new liabilities on mine operators, the Court found no due process violation:

"In sum, the Due Process Clause poses no bar to requiring an operator to provide compensation for a former employee's death or disability due to pneumoconiosis *arising out of employment in its mines*, even if the former employee terminated his employment in the industry before the Act was passed." 428 U.S. at 19-20 (emphasis added).

Similarly, in *R. A. Gray & Co.*, the Court upheld the retroactive imposition on employers of the withdrawal liability provisions of the MPPAA. Addressing the argument that the decision in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935), should control, the Court stated:

"Unlike the statute in *Alton*, which created pensions for employees *who had been fully compensated while working for the railroads*, the MPPAA merely requires a withdrawing employer to compensate a pension plan for benefits that have already vested with the employees at the time of the employer's withdrawal." 104 S. Ct. at 2720 (emphasis added).

The type of "connection" or "relationship" which the Court found and used to uphold the statutory imposition of added liabilities in the cases outlined above is notably absent in the case at bar. The liability for subsidence damage, both past and future, *had already been determined and compensation paid* when the mineral estate owners, or their predecessors in interest, acquired support estate rights. The Subsidence Act assigns burdens "out of proportion" to the actions of the mineral owners, and grants a windfall to surface owners who have already profited from the sale of support rights.

It is not suggested here that Pennsylvania lacks the governmental power to prohibit subsidence or to require the correction of subsidence damage. To the contrary, if the state determines that the exercise of property rights associated with support estates is detrimental to public welfare, it could acquire those rights under its

power of eminent domain, thereby distributing the burden of dealing with subsidence among the public at large. Alternatively, the state could require surface estate owners to repair any subsidence damage which occurs or to obtain the support estate when necessary,⁵ thereby distributing the burdens in close approximation to the benefits conferred.

The primary fault of the Subsidence Act lies in its failure to provide a reasonable distribution of the burdens and benefits of this governmental action. Mineral estate owners who receive no measurable benefits under the Act are singled out to bear all the costs and associated burdens. Surface estate owners who receive all the benefits of the Act are required to bear none of the costs or other burdens. The exercise of the police power to encumber an identifiable group of persons with all the costs and burdens of a state solution, which grants significant benefits to others, is irrational.

CONCLUSION

The Subsidence Act is an excessive use of the police power and as such violates substantive due process requirements. The Act protects private interests on the pretense of furthering meager public ones. Moreover, the Act makes no effort to balance out the burdens imposed with benefits obtained. Consequently, there is no relation between the conduct of the mineral owners and the costs imposed upon them for the benefit of surface owners. For these reasons, the Court of Appeals' decision should be reversed and the Subsidence Act should be invalidated as

⁵ The use of the power of eminent domain to promote the public welfare by transferring property interests from one private owner to another has been sustained by this Court as an allowable method to redistribute property interests when necessary to protect the public welfare. *Hawaii Housing Authority v. Midkiff*, — U.S. —, 104 S. Ct. 2321, 2328-30 (1984).

violative of the Due Process Clause of the Fourteenth Amendment.

DATED: May 22, 1986.

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AMICUS CURIAE

BRIEF

MAY 23 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

KEYSTONE BITUMINOUS COAL ASSOCIATION, HELVETIA
COAL COMPANY, ROCHESTER & PITTSBURGH COAL COM-
PANY, U.S. STEEL MINING Co., INC., UNITED STATES
STEEL CORPORATION and CONSOLIDATION COAL COM-
PANY,

Petitioners,

v.

PETER S. DUNCAN, PHILIP ZULLO
and THOMAS B. ALEXANDER,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

**BRIEF OF THE NATIONAL COAL ASSOCIATION,
THE AMERICAN MINING CONGRESS AND THE
MINING AND RECLAMATION COUNCIL OF AMERICA
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

1. Whether the court of appeals properly distinguished this Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), in holding that a state can compel mine operators to abandon their coal in the ground in order to serve the state's interest in economic development without violating the Takings Clause of the Fifth Amendment.

2. Whether the court of appeals correctly held that, when state legislation severely impairs a private contract, the standard of review under the Contract Clause of the Constitution is no different than the standard which governs a substantive due process challenge to such laws.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

 No. 85-1092

KEYSTONE BITUMINOUS COAL ASSOCIATION, HELVETIA
 COAL COMPANY, ROCHESTER & PITTSBURGH COAL COM-
 PANY, U.S. STEEL MINING CO., INC., UNITED STATES
 STEEL CORPORATION and CONSOLIDATION COAL COM-
 PANY,

v.

Petitioners,

PETER S. DUNCAN, PHILIP ZULLO
 and THOMAS B. ALEXANDER,

Respondents.

On Writ of Certiorari to the United States
 Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL COAL ASSOCIATION,
 THE AMERICAN MINING CONGRESS AND THE
 MINING AND RECLAMATION COUNCIL OF AMERICA
 AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

The National Coal Association is a nonprofit trade association representing coal mining companies which own or operate more than 50% of the Nation's coal producing capacity. The American Mining Congress is a nonprofit association comprised of mining companies which produce a major proportion of the nation's minerals, including coal, metals, and nonmetallic industrial and agricultural minerals. The Mining and Reclamation

Council of America is a voluntary nonprofit association of coal producers of all sizes throughout the United States whose primary function is to assist its members in dealing with public issues surrounding surface coal mining. The basic purpose of *amici* is to represent the interests of the mining industry and to cooperate with public authorities in dealing with problems that affect mining.

This case is of great consequence to the coal mining industry in the United States. The fundamental questions involved here are whether government can take coal property without compensation and under what circumstances it can dictate the manner of underground coal extraction in complete derogation of long-standing, privately negotiated arrangements between the owners of surface and subsurface property.¹ A decision departing from the holding of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), would have a devastating impact on the coal industry's effort to develop our Nation's most abundant energy resource in a manner consistent with conservation of that resource. It would also disrupt the evolution of state regulatory programs being implemented pursuant to federal law and has the potential to generate a spate of litigation in state and federal courts seeking to rearrange privately negotiated outcomes and the present system of risk allocation among adjoining property owners.

Because of *amici*'s familiarity with government regulation of coal mining and concern over the outcome of this case, this brief is submitted to assist the Court in its resolution of the issues presented.²

¹ These properties are "adjoining" as discussed *infra*, beginning at page 6.

² Pursuant to Rule 36 of the Rules of this Court, the parties to this case have consented to the filing of this brief. Copies of their letters of consent have been filed with the Clerk of this Court.

STATEMENT OF THE CASE

The petitioners are owners of coal properties and operators of full extraction underground bituminous coal mines in Western Pennsylvania, and a state association of coal mining companies. With the exception of the association, Rochester & Pittsburgh Coal Company and Helvetia Coal Company, the other petitioners also own or operate full extraction underground bituminous coal mines in other states which do not, as of yet, impose restrictions comparable to Pennsylvania.³

Like other members of our nation's underground bituminous coal mining industry, much of petitioners' coal property lies hundreds of feet beneath surface land that is owned by others. Also like other members of our Nation's underground bituminous coal mining industry, petitioners have acquired the right to mine all the coal without being required to leave certain coal in the ground to support the overlying surface.

Unlike other members of our nation's underground bituminous coal mining industry, petitioners have been and are being required by state officials to (1) grant a perpetual easement of support in favor of the owners of the adjoining, overlying privately held surface property and (2) compensate the owners for *all* resulting property damage when the abandoned coal ultimately fails to provide support.

Because the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, 52 Pa. Stat. Ann. § 1406.1 *et seq.* (Purdon's Supp. 1985), which imposes the requirements at issue in this case, severely limits both the amount and method of coal extraction and imposes huge

³ Partial extraction underground mining does take place in some areas of the country where operators have acquired only the mineral estate and not the right to subside.

potential liabilities,⁴ petitioners initiated this action, asking the courts to declare unlawful and to enjoin the support and compensation provisions of the Act and its implementing regulations.

Petitioners alleged that the support requirements of the Act and implementing regulations caused an uncompensated taking of their property in violation of the Fifth and Fourteenth Amendments, and that the compensation requirements impermissibly destroyed petitioners' contract rights in violation of Article I, Section 10 of the Constitution.

Both the district court and the court of appeals concluded that it was constitutionally permissible for a state to curtail the amount of coal an operator could mine, thus granting the adjoining, overlying surface owner an easement of support without compensation, and that Pennsylvania could further impose liability for damages, once the coal left in place fails to provide support.

SUMMARY OF ARGUMENT

Although this case involves only a Pennsylvania statute regulating coal mine subsidence, it nonetheless has important national implications. The court of appeals departed from, and indeed emasculated, this Court's landmark decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In addition, the court of appeals completely ignored this Court's two leading precedents interpreting the Contract Clause in cases involving private contracts. *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

⁴ Over 14,000 structures have been undermined in the manner required by the Act. When, not if, the coal abandoned beneath these structures deteriorates and the surface eventually subsides each owner will then have the right to claim damages from a Pennsylvania operator. J.A. 290.

Petitioners ask this Court to hold that Section 4 of the Act violates the Takings Clause of the Fifth Amendment, as incorporated into the Fourteenth Amendment, and Section 6 of the Act impairs petitioners' contracts in violation of the Contract Clause. The *amici* adopt fully petitioners' arguments.

The Pennsylvania Act radically alters long-standing legal relationships between surface land owners and the adjoining owners of underlying subsurface mineral estates. The court of appeals' erroneous approbation of Pennsylvania's intervention in those relationships has cast substantial doubt on their continued viability in other states. The coal industry and those whose livelihood depends upon its continued viability have a reliance interest in the well settled body of state property and contract law under which those relationships were established.

Until the decision of the court of appeals, *Pennsylvania Coal* had been understood to have circumscribed the role of government in the development of coal by underground mining methods. As this Court recognized in that case, the only value of subsurface coal is the right to mine it. 260 U.S. at 414. Until now, the Nation's coal industry believed that the exercise of its rights, created under well settled state property and contract law, were protected. Vast coal reserves were acquired in reliance on the holdings of *Pennsylvania Coal* and with the justifiable assumption that the right to mine was constitutionally protected.

Pennsylvania Coal was also believed to establish clear guidelines for regulatory authorities. In specific recognition of *Pennsylvania Coal*, the federal government and other states have tailored their regulatory programs to accommodate its holding. As a result, underground coal production is proceeding throughout the nation with the interests of the private surface owner, the coal owner and the public maintained in reasonable balance. This

proves that public or government interests such as land restoration, preservation of the tax base and economic development can readily be accommodated without radical disruption of underground coal mining and the rights of the operators.

Continued faithfulness to *Pennsylvania Coal* will also enhance our National interest by promoting coal development in a manner consistent with the conservation of energy resources.

ARGUMENT

I. THE COAL INDUSTRY HAS RELIED UPON THIS COURT'S DECISION IN *PENNSYLVANIA COAL* AND BECAUSE THIS IS SO THE DECISION BELOW SHOULD BE REVERSED.

For well over a century underground mining in the various coal producing states has been planned and conducted in reliance on and in accordance with well recognized principles of state property and mineral conveyancing law which sanctioned the removal of all economically recoverable coal from a given tract of land by underground mining methods if the owner of the coal had acquired the right to do so under state law.⁵

Indeed, this Court recognized many years ago that when, as occurred in this case, title to the subsurface mineral estate is held by a person other than the owner of the overlying, thus "adjoining" surface land the mineral estate is the dominant estate. *Pennsylvania Coal; Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488 (1928). In such circumstances, the law has consistently recognized that it is the surface owners, not the mineral owners, who must make accommodations in the use of their

⁵ See Ingram, *Regulation of Mine Subsidence—Legal Issues Raised by Government Intervention in Historically Private Arrangements*, 5 Eastern Min. L. Inst. 6.01 [4] (1984); 6 American Law of Mining § 203.02 (2d Ed. 1985).

property. *Kinney Coastal Oil Co. v. Kieffer; Transwestern Pipeline Co. v. Kerr-McGee Corp.*, 492 F.2d 878 (10th Cir. 1974), cert. dismissed, 419 U.S. 1097 (1975).

The common law of property in the several coal producing states has long recognized that surface owners may by conveyance or contract release, in whole or in part, the right to have the land surface supported.⁶ Until 1977, with limited exception, legal relationships between surface owners and the owners of severed mineral estates had been, for over 100 years, governed by private agreements founded upon state property law with limited government regulation.⁷

Within this settled framework of legal precedents, all concerned parties knew or were able to learn, by routine title examination, the rights being acquired in the property they were purchasing. Coal operators knew with certainty that, if the chain of title to a subsurface mineral estate in Ohio or Illinois or any other coal producing state

⁶ *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) (discussing Pennsylvania law); *Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S.E. 24 (1905); *Paul v. Island Coal Co.*, 44 Ind. App. 218, 88 N.E. 959 (1909); *Boyer v. Old Ben Coal Corp.*, 229 Ill. App. 56 (1923); *Case v. Elk Horn Coal Corporation*, 210 Ky. 700, 276 S.W. 573 (1925); *Rush v. Sines Bros. & Co.*, 34 Ohio App. 38, 170 N.E. 379 (1929); *Eastwood Lands, Inc. v. United States Steel Corp.*, — Ala. —, 417 So. 2d 164 (1982). See also 4 American Law of Mining § 21.14 (1st Ed. 1960); 6 American Law of Mining § 203.02[1] (2d Ed. 1985).

⁷ Pennsylvania was an obvious exception to the general pre-1977 pattern of limited state regulation. See 52. P.S. § 1406.1, et seq. Several western states also had statutes dealing with subsidence, but these statutes merely required operators to post bonds to cover possible damage, they did not purport to limit the amount of coal which could be mined. See 4 American Law of Mining § 21.16, n.14 (1st Ed. 1960). In general, the various legislatures of the major coal producing states have not seen fit to disturb a system of private risk allocation, vital to the coal industry, which has existed and worked satisfactorily for many years.

entitled the grantee to mine all the coal without leaving support and without liability for damages to the overlying, adjoining surface land or structures they could invest in that property and mine all the coal—without concern for unforeseen contingent liabilities—wherever mining or market conditions justified development of the parcel.⁸

Reliance was justified because state property law was settled and this Court's decision in *Pennsylvania Coal* protected from subsequent legislation the exercise of these privately agreed upon, state sanctioned, property and contract rights.

Over the last 64 years, title to billions of tons of coal throughout the Nation has been examined and, where appropriate, certified as including the property and contract rights held to be inviolate by this Court in *Pennsylvania Coal*. In addition, on the strength of these certifications, huge capital investments have been made, essential planning conducted and contracts formed.

The acquisition of title to coal property and contract rights, indistinguishable from those held to be protected from uncompensated legislative appropriation and total impairment in *Pennsylvania Coal*, has become "a long-accepted commercial practice," in this country. See *United States v. Maine*, 420 U.S. 515, 528, n.9 (1975).

The holding of the court of appeals, which sanctions one state's decision to ignore the precedent set by this Court in *Pennsylvania Coal*, has needlessly clouded what has long been understood to be clear title to vast reserves of coal. In their brief the petitioners have demonstrated that conditions in Pennsylvania are no different today than they were over 60 years ago when the police power was found to be insufficient to justify the destruction of rights, which were then also recognized as well-settled.

⁸ See authorities cited in footnote 6, *supra*.

Amici submit that 60 years of justifiable reliance by the nation's entire coal industry on the settled law of mineral conveyancing must not be suddenly dashed.

This case properly can be decided and society's interest in the development of consistent and predictable legal rules can be best served by reversing the decision of the court of appeals and by reaffirming *Pennsylvania Coal*—the major precedent upon which the nation's coal industry has relied for over one-half century.

II. THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED BECAUSE IT WILL DISRUPT THE CERTAIN PATTERN OF REGULATION WHICH HAS DEVELOPED IN MOST STATES SINCE THE PASSAGE OF THE FEDERAL SURFACE MINING CONTROL AND RECLAMATION ACT.

Aside from a need to be able to rely upon the validity of their mining and property rights, nothing is more important to coal operators than to know how the government intends to regulate their mining activities. And, as discussed above, for many years there was little or no actual government involvement in the area of subsidence control.

In 1977, however, Congress passed the Federal Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C.A. §§ 1201, *et seq.* (Supp. 1986).⁹ SMCRA, for

⁹ SMCRA was enacted to insure that coal mining would be subject to relatively uniform minimum levels of regulation throughout the nation. It is a classic federal "carrot and stick" regulatory statute. The "stick" is contained in 30 U.S.C. § 1254(a) which provides that unless a state submits a program of laws "in accordance with" SMCRA and a program of regulations "consistent with" those promulgated by the Federal Office of Surface Mining ("OSM"), the federal government will assume primary jurisdiction over the regulation of the surface effects of underground coal mining. The "carrot" is contained in other provisions of SMCRA which provide substantial federal financial assistance to states which elect to retain

the first time, addressed the issue of mine subsidence on a national scale and imposed a requirement upon underground mine operators to adopt measures to prevent subsidence causing material damage to the maximum extent technologically and economically feasible. However, Congress specifically exempted operators utilizing full extraction mining techniques which result in planned and controlled subsidence from any requirement to adopt subsidence prevention measures. Section 516(b)(1) of SMRCA, 30 U.S.C.A. § 1266(b)(1), provides in pertinent part as follows:

(b) Permit Requirements

Each permit issued under any approved State or Federal program pursuant to this [Act] and relating to underground coal mining shall require the operator to—

(1) adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of such surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner; Provided that nothing in this subsection shall be construed to prohibit the standard method of room and pillar mining; . . . (Emphasis supplied.)

This exemption is extremely significant for the Nation and for the bituminous underground coal mining industry because it expressly authorizes the continued use of full extraction techniques such as longwall mining. As

exclusive jurisdiction over the regulation of underground coal mining by submitting approved primary programs. See, e.g., 30 U.S.C.A. §§ 1231-1243 and 30 U.S.C.A. § 1295. SMCRA, however, only sets minimum standards and each state is free, subject to constitutional limitation, to impose more stringent standards.

petitioners point out in their brief, longwall mining has become for many underground operators the preferred method of mining because in many areas this method can be more efficient and provides a greater safety factor. See Report by the Comptroller General of the United States, *Alternatives to Protect Property Owners from Damages Caused by Mine Subsidence* 26 (1979) ("Alternatives").¹⁰

In part this exemption was based upon a recognition that to preclude the use of full extraction techniques would raise the very same constitutional issues put to rest by *Pennsylvania Coal*.¹¹ It was also based upon a congressional awareness that full extraction mining has many practical advantages. For example, full extraction mining furthers Congress' purpose, set forth in Section 102(k) of SMCRA, 30 U.S.C.A. § 1202(k), "to encourage the full utilization of coal resources through the development and application of underground extraction techniques." Also, full extraction mining techniques, unlike respondents' requirement that at least 50% of petitioners' coal be left in random support areas dictated by the location of surface structures and not by the mine plan, also is the best method to prevent future subsidence damage. This is so because all subsidence which will occur takes place immediately and allows for immediate development of the surface without the risk of future sub-

¹⁰ As petitioners also point out in their brief it is not possible to utilize full extraction mining techniques when an operator is required by law to avoid surface subsidence by leaving pillars of coal in place as a permanent easement of support.

¹¹ One of the leading sponsors of SMCRA specifically recognized the precedent of *Pennsylvania Coal* and the constraints of the Fifth Amendment and cautioned that Congress could not go too far in regulating property and contract rights when considering amendments to SMCRA. See 123 Cong. Rec. H 3827 (daily ed. Apr. 29, 1977) (remarks of Rep. Udall).

sidence. See *Alternatives*, 26; H.R. Rep. No. 218, 95th Cong., 1st Sess., 658 (1977).¹²

Respecting the basic protection of the Takings Clause, Congress simply did not intend the limited mine subsidence provisions of SMCRA to work takings or to impair preexisting contract rights.

Without doubt, until the court of appeals' decision in this case, all affected parties correctly and justifiably believed that *Pennsylvania Coal* was the controlling rule in this area of the law. Indeed, in 1983 the Secretary of the Interior promulgated regulations requiring underground mine operators to repair subsidence damage to structures *only to the extent required by state law*.¹³ 48 Fed. Reg. 24652 (1983).

Only by reversing the court of appeals' decision in this case can the relative certainty of regulation, which had existed from state to state and which had permitted the development of multi-state mine operations, be restored.¹⁴

¹² Confiscating an operator's coal for use as a permanent easement of support for the surface simply does not work. The extraction of coal in longwall or retreat mining is conducted in such a way as to relieve the tremendous pressure exerted on the underground workings and roof support system. To require the retention of random pillars inconsistent with the full extraction plan will result in mounting downward pressure on those pillars and eventually, as air and water erode the pillar and downward pressures mount, the pillar will collapse and the surface will abruptly and unpredictably subside. This established fact is best evidenced by Pennsylvania's own admission that much mine subsidence damage has occurred even though the mine operator's partial extraction methods conformed to state requirements. *Alternatives* 26; J.A. 89; 143-145; 290.

¹³ Due to a procedural problem these regulations have been remanded for additional comments and are presently under consideration by the agency. 50 Fed. Reg. 27910, 27911 (1985). This is an additional reason to reaffirm *Pennsylvania Coal*. Regulators, like those regulated, require clear guidelines to enable them to plan their programs.

¹⁴ The amici and their members have also relied upon *Pennsylvania Coal* in the context of other aspects of SMCRA's regulatory

Amici submit that mine subsidence is in fact less of a problem today than it was 60 years ago. Not only are today's operators mining, in many locations, at depths where surface subsidence effects are virtually undetectable, they are using techniques which maximize recovery and conservation of a valuable natural resource which enables them to plan and predict when and how subsidence will occur. See *Alternatives* 27.

There is no doubt that respondents are now enforcing a program of state laws and regulations which was beyond their power to enact. The words of Justice Holmes are still as forceful today as they were 60 years ago:

[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

260 U.S. at 416 (emphasis added).

III. PENNSYLVANIA'S SUBSIDENCE CONTROL PROGRAM GOES TOO FAR.

No other state, including those other states where mining occurs beneath developed surface properties, has gone as far as Pennsylvania in disturbing the traditional legal

program. Under Section 522 of SMCRA, 30 U.S.C. § 1272, Congress prescribed an elaborate procedure to designate certain lands unsuitable for surface coal mining operations, but was careful to make any designation of unsuitability subject to the valid existing rights of the owner of the mineral estate. After reflection, OSM elected to adopt a traditional analysis and employed a "takings test," exempting from the prohibitions of Section 522 property interests in circumstances where the application of the prohibitions would effect a taking of property entitling the person to constitutionally mandated compensation. 48 Fed. Reg. 41348 (1983). OSM's regulation embodying the "takings test" has also been remanded on notice and comment grounds and is under consideration by the agency. See *In Re Permanent Surface Mining Regulation Litigation*, 22 E.R.C. 1557 (D.D.C. 1985).

relationships which have long defined the correlative rights of adjoining, overlying property owners. Only respondents appropriate coal and impair contract rights in their attempt to respond to the subsidence problem. *Amici* submit that this fact alone demonstrates that Pennsylvania has gone, in the words of Justice Holmes, "too far."

The simple fact that other states have been able to satisfactorily accommodate the rights of the dominant mineral estate owner and the subservient surface owner within the framework of *Pennsylvania Coal* is proof that respondents' actions are neither "reasonable" nor "necessary." Cf. *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

West Virginia, Ohio, and Virginia are among the major coal producing states which do not require coal operators to leave coal in place beneath privately owned structures when they have acquired property and mining rights identical to petitioners.¹⁵ Alabama also recognizes the right of coal operators to fully mine when they have the necessary right to do so. See *Eastwood Lands, Inc. v. United States Steel Corp.*, — Ala. —, 417 So.2d 164 (1982). Indiana and Illinois also do not require operators who own the right to mine all the coal beneath a privately owned structure to partially mine.¹⁶

There are myriad ways to achieve respondents' purported goal of protecting Pennsylvania's tax base. A

¹⁵ See VII W. Vir. Admin. Code, Chap. 20-6, § 7C.02 (1985); Ohio Admin. Code, § 1501:13-12-03 (1985); Vir. Admin. Code § V817.124 (1984). Each of these states permit operators to fully mine beneath privately owned structures.

¹⁶ See 310 Ind. Admin. Code § 132 (1985); 62 Ill. Admin. Reg. § 1817.124 (1986). Illinois, however, requires operators to take steps to correct any damage caused to overlying structures.

more aggressive use of that state's low cost subsidence insurance program, as suggested by petitioners, is one alternative.¹⁷ Encouraging, whenever practicable, mining techniques which result in planned subsidence in a predictable and controlled manner, is another. Requiring that new homes in areas where mining will occur meet special building code standards is another. See generally *Alternatives*.

The "unnecessary" character of respondent's subsidence control program becomes even clearer when the numerous other subsidence related protections afforded property owners in Pennsylvania are considered:

1. Before petitioners can mine any coal they must obtain a permit from DER, see Section 5 of the Act, 52 Pa. Stat. Ann. § 1406.5 and 25 Pa. Admin. Code § 86.11 (1985);

2. As a part of this permit process they must demonstrate, among other things, that they own or control the right to mine the coal they intend to mine which assures that surface owners who do own the support estate are not deprived of their rights, see 25 Pa. Admin. Code § 86.62(a)(ii) (1985);

3. Operators must also submit a detailed five year subsidence control plan which DER will reject or modify unless the plan demonstrates that the mining methods to be used beneath the surface lands of others will control subsidence causing material damage to the extent technologically and economically feasible, see Section 5(e) of the Act, 52 Pa. Stat. Ann. § 1406.5(e) and 25 Pa. Admin. Code § 89.143 (1985);

4. Petitioners must also notify each private landowner and municipality six months in advance that mining will

¹⁷ See Act of July 1, 1971, P.L. 188, as amended, 52 Pa. Stat. Ann. §§ 3201, et seq. (Purdon's Supp. 1986).

be occurring beneath their property, *see* Section 10 of the Act, 52 Pa. Stat. Ann. § 1406.10 and 25 Pa. Admin. Code § 89.144 (1985);

5. Purchasers of surface property all receive express notice that they have no right to claim damages for subsidence, *see* Section 1 of the Act of July 17, 1957, P.L. 984, *as amended*, 52 Pa. Stat. Ann. § 1551 (Purdon 1966) and Section 14 of the Act, 52 Pa. Stat. Ann. § 1406.14;

6. The Commonwealth and its municipalities are empowered to acquire needed support by eminent domain;

7. Finally underground mining which will actually pose a danger can be enjoined, *see* 25 Pa. Admin. Code § 89.143(f) (1985).

A state may not take coal property and impair a contract or otherwise legislate "without moderation or reason" in a spirit of oppression. *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60 (1935). Prohibiting extraction of coal and conferring a right to damages where none exists, in addition to affording all the other protections discussed above, cannot be justified as "reasonable" or "appropriate."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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May, 23, 1986

AMICUS CURIAE

BRIEF

9
No. 85-1092

Supreme Court, U.S.

FILED

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

KEYSTONE BITUMINOUS COAL ASSOCIATION,
HELVETIA COAL COMPANY, ROCHESTER &
PITTSBURGH COAL COMPANY, U.S. STEEL
MINING CO., INC., UNITED STATES STEEL
CORPORATION AND CONSOLIDATION COAL COMPANY,
Petitioners

v.

PETER S. DUNCAN, PHILIP ZULLO
and THOMAS B. ALEXANDER,
Respondents

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
BRIEF OF AMICI CURIAE
MID-ATLANTIC LEGAL FOUNDATION,
TRI-STATE COAL OPERATORS
ASSOCIATION AND WILLIAM BOYLE
IN SUPPORT OF PETITIONERS**

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and THOMAS B. ALEXANDER,

Respondents

On Writ of *Certiorari* to the United States Court of
Appeals for the Third Circuit

BRIEF OF AMICI CURIAE MID-ATLANTIC LEGAL FOUNDATION, TRI-STATE COAL OPERATORS ASSOCIATION AND WILLIAM BOYLE IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI

Pursuant to this Court's Rule 42, Mid-Atlantic Legal Foundation, Tri-State Coal Operators Association and William Boyle hereby move this Court for leave to file the attached brief as *amici curiae*. Consent was secured

from counsel for all parties. Copies of the letters of consent have been filed with this Court.

Tri-State Coal Operators Association ("TSCOA") is a non-profit organization, primarily founded to encourage and foster the security of independent coal mining operators and to promote stable and harmonious relations among its members, service and support industries, other indirect industries and the general public. It currently has forty-six members, consisting of coal operators, service and support industries and indirect industries in the area of West Virginia, Maryland and Pennsylvania.

TSCOA's members operate both surface and sub-surface mines, several of which have been affected by the statute at issue in this case, Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act (52 Pa. Cons. Stat. Ann., §§1406.1-1406.21) ("Bituminous Act").

William Boyle is a vice-president and shareholder of Viking Coal Company, Kingwood, West Virginia, a member company of TSCOA.

Mid-Atlantic Legal Foundation is a non-profit, tax exempt corporation organized and existing under the laws of Pennsylvania. It is a public interest law firm which participates in litigation involving matters of broad public interest such as the instant case.

STATEMENT OF THE CASE

For the sake of brevity *amici* do not separately set forth their statement of the case but adopt that set forth by the petitioners.

ARGUMENT

I. Introduction

The decision below must be reversed and Pennsylvania's Bituminous Act declared unconstitutional to preserve and uphold: (1) the fundamental right of American citizens to own and invest in property free from government seizure; (2) the sanctity of contracts; and (3) the constitutional principle that decisions of this Court are the declared law of the land binding upon state legislatures and lower courts.

To do so this Court need only adhere to its prior decisions in "takings" jurisprudence, including *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), as well as several recent cases such as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Kaiser Aetna v. United States*, 444 U.S. 64 (1979). Further, *amici* submit that the time has come for this Court to announce a rule of *per se* statutory taking which would be applicable in cases such as the one at bar. The rule would operate whenever a statute has the practical effect of ordering the affirmative, physical dedication of private property to support a public endeavor.

II. Policy Considerations

A. The Right to Private Property

Several policy considerations mandate the nullification of the Bituminous Act. The right of private ownership of property secure from its confiscation by the realm is a constitutional and civil right as fundamental as any that may be found in the country's charter.

The citizens' right to private property and its protection from seizure by the "king" are embodied in two distinct clauses of the Constitution's Fifth Amendment:

"Nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Of course, the right of the individual to hold property secure from the state and to invest in a manner he deems properly productive is the underpinning of the country's free enterprise system. The vitality of that system requires that the Bituminous Act be struck down. In the face of *Mahon*, the action of the Pennsylvania legislature presents a serious challenge of societal philosophy: May a state disregard the just compensation clause by expanding its reasons for wanting private property. (Cf. *Mahon*, 260 U.S., at 416).

Further, the Third Circuit reasoned below that a citizen's investment backed expectations "are always circumscribed by the limitations on its use that may be imposed by the state in the public interest." (771 F.2d, at 717). That statement is in direct conflict with Justice Holmes' opinion in *Mahon*. [See also, *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 653 (1981) (dissenting opinion)]. Moreover, it is substantial evidence that the country has arrived at a time when, from the seed of recognition that a state may sometimes restrict property use, there has grown the unstated assumption reflected in the Third Circuit's statement, that U.S. citizens "always" hold their property subject to government dictate. If for no other reason than to reaffirm the constitutional foundations of our free enterprise system and the right of our citizens to own property free from government seizure, *Mahon* should be adhered to and the Bituminous Act stricken.

B. Sanctity of Contract

An equally fundamental right violated by the Bituminous Act is the right of citizens to enter into contracts freely and without fear that the rights and obligations

established by the contracts will be substantially impaired by government action. The sanctity of contract must be preserved.

In Pennsylvania, coal operators regularly negotiated with owners of the surface estate for operator ownership of the support estate.

The support estate is itself a valuable and independent property interest. The contracts for their acquisition typically contain assumptions of risk from subsidence and correlative waivers of operator liability.¹ Such considerations were paid for by the coal operators.

While from the surface, separate contracts may be viewed as applicable to separate surface properties, from under ground the contracts are seen as an integral aggregation of contracts which are necessary to the profitable operation of a mine.

With respect to private surface owners, the Bituminous Act reopens the negotiated contracts and requires forced sales back to the surface owners. Similarly, with respect to public surface owners or private owners of publicly used surface properties, the rights attendant to the support estate are stripped from the coal operators, and assumptions of subsidence risk and waivers of liability are nullified and reversed.

The support estate and the contracts on which they are based are basic to the coal mining operations.

As a matter of sound judicial policy their destruction should not be allowed, because allowance would write in a significant insecurity to all contractual arrangements which form the basis of any substantial enterprise.

C. Stare Decisis and the Integrity of the Constitutional System

1. As *amici* emphasized in their prior brief in support of the petition for *certiorari*, this case was effectively decided by this Court 64 years ago in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

With respect to the underlying facts, the regulatory scheme and the regulatory effects, the Bituminous Act, and regulations thereunder, which are addressed in the case at bar are operationally identical to the Kohler Act addressed in *Mahon*. (See Petition appendix, at 57a *et seq.*)

Both Acts seek to regulate coal mining throughout Pennsylvania. Both effect a transfer of a valuable and paid for property right (the support estate). Both amend valuable and paid for contract rights (negotiated waivers and assumptions of risk). Both impose physical restraint upon private property. Both prohibit the use of private property. Both prohibit the use of investment backed property for its intended, and only, profitable purpose. Both purport to protect essentially identical classes of surface structures. Both affirmatively order that coal be left in place in support of surface structures. Both purport to have been enacted in the exercise of police power for the benefit of the public safety and general welfare.

The only distinction in the operative provisions of the two Acts, is that one applies to anthracite coal and one applies to bituminous coal, a distinction patently devoid of any legal difference.

Because the Kohler and the Bituminous Acts are identical for the purpose of operational and constitutional analysis, the Bituminous Act should be struck down under the principle of *stare decisis*. While this Court may be somewhat less bound by the principle than the lower courts, in the view of *amici* the Acts are too similar to permit flexibility of the principle in the present situation.

The Court presently has before it another "takings" case, *MacDonald, Sommer & Frates v. County of Yolo, et al.* (No. 84-2015). There other *amici*, including National Association of State Legislatures and National Governors' Association, while supporting *Yolo's* regulation, acknowledged that the Kohler Act involved in *Mahon* was unconstitutional because that Act had destroyed the

valuable support estate and its related contracts. (*Amici* brief in *Yolo*, at 14).

Since the Bituminous Act destroys identical rights, the recognition by government *amici* of the validity of *Mahon* is a forceful argument (and admission) that the Bituminous Act must be struck down on the same grounds.

2. When the Pennsylvania legislature drafted the Bituminous Act it knew that the operative provisions of the Kohler Act and the Bituminous Act were to be the same. It was faced with the constitutional declaration of *Mahon* that the exercise of police power for public purposes, to the extent effected by the Kohler Act, and now newly contemplated by the Bituminous Act, was an insufficient constitutional justification for the taking.

The Pennsylvania legislature therefore sought in the Bituminous Act to end run this Court by adorning the statement of purposes with one or two new statements of why the Pennsylvania public wants the private property, principally, the prevention of tax base erosion and promotion of economic development, *i.e.*, in the language of the Third Circuit, the state's economic future and its "well being." (771 F.2d., at 715). The drafting of such enumerations of elements of the general welfare is insufficient to justify a state doing what this Court has already decided it cannot do.

As a matter of the integrity of our constitutional system, it is imperative that state legislatures, as all other entities governed by the constitutional decisions of this Court, be reminded that they must obey the law of the land as so declared, and that they are not free to write their own constitutional interpretations by imaginative draftsmanship.¹

1. Perhaps the most serious aspects of the stated purposes of the Act, as ratified by the court below, are the economic assumptions they evidence, *viz.*: that the state is better equipped to predict and direct future economic development than are the free forces of the marketplace, and that in order to promote the state's vision of the

III. Legal Considerations

Practical analysis of the operation of the Bituminous Act mandates its nullification under *Mahon*, under other existing legal principles, and pursuant to a rule of *per se* statutory taking which *amici* suggest be announced.

A. Operational Analysis

By its terms, the Bituminous Act was designed to prevent tax base erosion and to promote surface development, that is, to increase public income, or as the Third Circuit concluded, to promote the economic future of the state and its "well being." (771 F.2d, at 715). To accomplish those public ends, the legislature awarded certain owners of privately used surface properties the right to require mine owners to leave support coal beneath their properties. Although those private owners must compensate the mine owners, the Act gives the surface owners the right to effect a forced sale of the support coal, just as effectively as if the state had decreed a bill of sale. (52 Pa. Cons. Stat. Ann., §1406.15)

With respect to support coal principally beneath publicly owned or used properties and certain other private properties, numbering in the tens of thousands, the exact same result obtains, not by election of the property owners but by statutory order. In this case, however, no compensation is provided. (52 Pa. Cons. Stat. Ann., §1406.4)

In operative effect, the statute, by requiring the support coal to be left and by assigning liability where insufficient amounts are left, transfers title to that property to the public and spells out legal duties of the mine owners to affirmatively and physically provide support. The statute, in sum, converts private assets to public assets, orders those assets to be affirmatively, continuously and

(Footnote *Continued*)

proper economic future, it is justified not only in frustrating the fruition of privately invested assets, but in seizing them for the benefit of the state.

physically devoted no longer to private profit but to public profit, that is, *inter alia*, to the physical support of real estate development and to the production of public income through taxation.

"[T]he constitution measures the taking of property not by what a state says, or by what it intends, but what it does." [See, *Hughes v. Washington*, 389 U.S. 290, 298 (1967); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 653 (1981) (dissenting opinion)].

B. *Mahon*

Mahon is dispositive of the issue of the Bituminous Act's unconstitutionality. Because the Kohler Act addressed in *Mahon* and the Bituminous Act are on all fours, *stare decisis* should be applied as a purely legal matter, as well as a matter of judicial policy.

C. Existing Per Se Principles

While *Mahon* is dispositive of this litigation, if a *de novo* analysis of takings jurisprudence were undertaken, *Mahon* might not even have to be reached. The Bituminous Act should be held to work *per se* takings under existing takings principles.

1. Acquisition

As set forth above, the Pennsylvania legislature has acquired the support coal it has ordered to be left in place in order to support the tax base and land and general economic development, so to increase public income. The state has acquired the equitable and operational ownership of the support coal as effectively as if delivery of a deed had been decreed. The mine owner is left with bare legal, unproductive title. The state must pay for its acquisition.

2. Invasion

Under the Bituminous Act, the miner's private assets are converted into public assets to be forever affirmatively and physically employed in the production of public profit.

In the view of *amici*, for the purposes of constitutional analysis that conversion of operational ownership, coupled with certain duties of the miner and rights of the state under the Act results, and potentially results, in physical invasion of the miner's property in at least three ways:

(a) Post-Bituminous Act, when a miner enters the mine he does so in two roles, *viz.*, as miner of his remaining assets and as agent of the state with respect to the new public assets to be employed in support of surface structures (*Cf.* *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951));

(b) having converted private assets to public assets, the state reserves to itself the right to go into the private mine for purposes of inspection of the public assets and its agent's compliance with the Act (52 Pa. Cons. Stat. Ann., §1406.11);

(c) for purposes of inspection, the state will employ measuring equipment and, if less than the required amount of support coal has been left, the state may order the use of artificial roof supports within the miner's own mine.

[*Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)].

D. Statutory Per Se Test.

Commentators have written that takings jurisprudence is in a state of confusion. (*See, e.g., ROSE, Why The Taking Issue Is Still Muddled*, 57 So. Cal. L. Rev. 561 (1964).

Amici perceive, however, a clear theme contained in several of this Court's leading "takings" cases. It appears that when the Court has been presented with governmental action which, by whatever language used, whether mandatory or prohibitive, operates practically to order a citizen to use his property affirmatively and physically to support a public goal, this Court has found a

taking. [*See, e.g., Mahon; Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 64 (1979)]. Conversely, when the Government action addressed has merely prohibited a citizen from using his property in a certain limited manner, the Court has tended to find that no taking has occurred. [*See, e.g., Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 151 (1958)].

To date, however, when the Court has found a *per se* taking, it appears to have looked for some non-owner access or right of access resulting from the statutory mandate in question, for example, government occupation by statutory agency in *Pewee Coal*, TV cable wire in *Loretto*, public easement in *Kaiser Aetna*.

But in cases such as that presented by the Bituminous Act, access or entry by a non-owner may not be necessary for the government to accomplish its engineering goal. The owner's own obedience of the statutory mandate, coupled with the government's good luck that physical assets are in place, is all that is required. In such circumstances, continued search for resulting non-owner access appears to be unreal and unfair to the property owner.

Under the Bituminous Act, for example, an intended purpose is the direct physical support of the surface in order to provide the foundation for land development by the state or other private parties. The order to leave the support coal is as effective as if the statute decreed the transfer of ownership in fee simple to the state and/or as if the Pennsylvania National Guard or the U.S. Corps of Engineers were directed to take over the mines to do the necessary work.

The concept *amici* advance may be further exemplified by extrapolation of the facts presented in *United States v. Pewee Coal Co.*, 341 U.S. 14 (1941). There the Court found a taking where the U.S. Government had

taken possession of a mine and operated it. *Amici* suggest that the same result would have been reached had Congress ordered the owner to donate the coal to the war effort or to leave specific coal in place in support of a munitions plant on the surface.

Under the suggested rule, a *per se* taking would occur wherever, by the force of statute, a private property owner is ordered, in practical effect, to dedicate his property in affirmative and physical support of a public endeavor, in such a manner as to relieve the government from the necessity of deed transfer or physical occupation or invasion in order to accomplish the desired result. In other words, where statute is used as a practical matter to substitute for deed transfer, physical occupation or invasion, a "takings" will be held to have resulted.

Amici merely suggest the articulation as a standard of judgement, of that which appears to underlie existing jurisprudence. Such a standard will elevate substance over form where the state is in fact converting private assets to public assets.

In addition, the pronouncement of such a *per se* rule might well assist in bringing order to an area of law which some have judged to be confused. [E.g., Rose, *Why The Takings Issue Is Still Muddled*, 57 So. Cal. L.Rev. 561 (1984)].

Applied to the instant case, such a standard would, as it should, require the nullification of the Bituminous Act.

E. Quantum Tests

Obviously, *amici* are of the view that the unconstitutionality of the Bituminous Act should be disposed of as a matter of *stare decisis* and as a *per se* taking.

For the sake of completeness, *amici* point out that the Act would fall under two theories requiring some *de*

facto quantum analysis.²

1. Physical Restraint

At least twice in recent years, this Court has indicated that a "taking" would occur where there was a physical restriction which interfered with an investment-backed expectation. (*Andrus v. Allard*, 444 U.S. 51, 66 n. 22 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)).

Both criteria are present in the instant case. Petitioners have been deprived of a profit opportunity. They have been and will be forced to leave approximately 30 million tons of coal in their mines (C.A. App. 99a-132a). Other coal operators, including members of TSCOA, have been and will be forced to leave millions of additional tons. They cannot use or sell this coal, formerly private property, for a profit.

The second criterion also obtains. Petitioners and all other coal operators are physically restrained from removing as much as 50% of their coal beneath thousands of structures. The Bituminous Act proscribes the removal.

Reliance below by the respondents on *Hodel v. Virginia Surface Mining and Reclamation Ass'n., Inc.*, 452 U.S. 264 (1981), is misplaced. *Hodel* involved surface mining. The instant case involves sub-surface mining. *Hodel* found no facial violation in principal part because the surface land might well have had alternate economic value. Here the sub-surface coal's only value is in its mining. (*Mahon*, 260 U.S., at 414).

2. It should be noted that in both theories the government action has been viewed solely as prohibitive of use, and not involving affirmative action of owner, state or third party, as in the case of the *per se* tests discussed above.

2. Substantial Destruction

Similarly, although not a holding of the Court as yet, four sitting members have indicated that a *de facto* taking may occur where the effects of government action deprive the owner of all or most of his interest in the property. [*San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 653 (1981) (Dissenting Opinion)]

Here, a distinct property interest, the support estate, and related contracts, have been totally destroyed as assets in the hands of the mine owners. The preferred method of mining has, *de facto*, been prohibited and, *amici* are informed that that prohibition will totally destroy the economic viability of at least some mines.

Mine owners' interests in more than 30 million tons of coal have been destroyed.

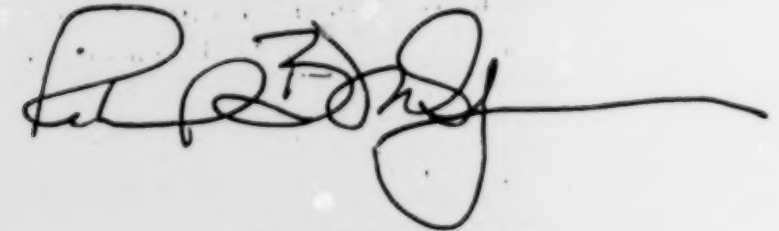
Summary and Conclusion

The Subsidence Act should be held unconstitutional for several policy reasons.

In addition, as a purely legal matter, the Act is unconstitutional: under *Mahon*; as effecting *per se* takings; under the new "statutory *per se*" rule suggested by *amici*; and under existing principles which hold a taking to have occurred where the owner's interests are substantially destroyed by purely prohibitive use regulation.

For all of the foregoing reasons, the decision of the court of appeals should be reversed and the Bituminous Act declared unconstitutional.

Respectfully submitted,



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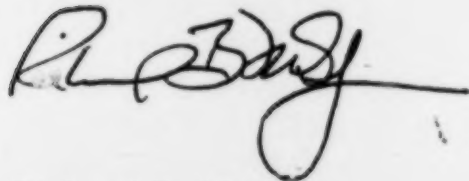
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May 23, 1986

AMICUS CURIAE

BRIEF

(11)
No. 85-1092

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIEL, JR.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

KEYSTONE BITUMINOUS COAL ASSOCIATION, *et al.*,
Petitioners,

v.

NICHOLAS DEBENEDICTIS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF THE
NATIONAL CONFERENCE OF STATE LEGISLATURES,
U.S. CONFERENCE OF MAYORS,
COUNCIL OF STATE GOVERNMENTS,
INTERNATIONAL CITY MANAGEMENT ASSOCIATION,
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL GOVERNORS' ASSOCIATION,
AND NATIONAL LEAGUE OF CITIES
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Whether a state land use regulation can be challenged as a taking of private property within the meaning of the Just Compensation Clause of the Fifth Amendment.

Even if state land use regulation can be challenged as a taking under the Just Compensation Clause, whether a state law restricting the amount of coal that can be removed from beneath certain structures is, on its face, constitutionally invalid as a taking of private property.

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AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

 INTEREST OF *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in the legal issues that affect the powers and responsibilities of state and local government.

This case concerns regulation of the use of land. The increasing industrial assault on the land has been ac-

knowledge at every level of government; and the need for government to control the erosive effects of the myriad individual, private decisions that can destroy the land and other resources is clear. Increasingly, and often at the behest of the federal government, state and local governments seek ways to preserve the land and the environment on which the quality of life ultimately depends.

The land use regulation at issue in this case is the reasoned response of a State, the Commonwealth of Pennsylvania, to the devastating environmental and economic effects of bituminous coal mining. In 1966, Pennsylvania exercised its police powers to protect the health, safety, and welfare of its citizens and to preserve the State's ultimate economic base, the land. Through the enactment of the Bituminous Mine Subsidence and Land Conservation Act, 52 Pa. Stat. Ann § 1406.1 *et seq.* (Purdon Supp. 1986), the Commonwealth sought to avert the harmful effects of subsidence, in order to ensure future beneficial use of the land.

The blight which can ensue from unrestrained coal mining has been recognized as a matter of national, not just nationwide, concern. In 1977, Congress enacted the Surface Mining Control and Reclamation Act, 30 U.S.C. (1982 & Supp. 1983) § 1201 *et seq.* The Pennsylvania Act, with its implementing regulations, is part of the regulatory scheme established pursuant to the federal Act, and has been approved by the federal government for the purpose of giving Pennsylvania primary control over mine reclamation activity within its borders.

A ruling for petitioners in this case would threaten the ability of all state and local governments, not just Pennsylvania, to regulate effectively to protect the public health, safety, and welfare of their citizens from the harmful effects of subsidence and other evils attendant to excessive mining of land. This case presents two issues of profound concern to *amici*. First, the Court's use of

the word "taking" in the context of land use regulation has created significant confusion about the standard by which to judge the validity of such regulation. The issue is whether the constitutionality of a land use measure enacted pursuant to the State's police power should be determined by the standards generally applicable to police power regulations or by the potentially more stringent standards applicable to physical occupation or invasion of land or destruction of property rights. This latter possibility has created significant exposure of state and local land use measures to invalidation, and, in some cases, monetary liability.

Amici are also concerned that the Court's continued reference to the word "taking" in the land use context will increase the already accelerating pace of litigation in this area. The Court has confronted allegations of taking through land use regulation four times in the last six years and has one case in addition to this one on its docket for the 1986 Term. *First English Evangelic Lutheran Church of Glendale v. Los Angeles County*, No. 85-1199.

Second, this case presents the issue whether, even if the concept of taking is applicable to this type of land use measure, such regulation can be found to be invalid on a facial challenge, without any showing of the effect on property or commercial interests in a concrete enforcement context. A decision by the Court to entertain a takings challenge in the procedural posture of this case would have disruptive and distressing consequences. Reversal of the decision below will inevitably lead to facial challenges to innumerable other land use measures, adding to the burden of litigation currently borne by state and local governments and by the federal courts.

This Court has decisively rejected a similar facial challenge to the federal statute regulating the same activities as Pennsylvania's Subsidence Act. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). *Amici* urge the Court to exercise the same restraint with respect to the state law.

Amici submit that the decision of the court below is correct. Because this Court's decision will have direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.

STATEMENT OF THE CASE AND INTRODUCTION

Petitioner Keystone Bituminous Coal Association, an unincorporated association of coal miners and owners of underground coal reserves, together with five corporations engaged in underground coal mining operations in Pennsylvania, filed this civil rights action in 1982, against officials of Pennsylvania's Department of Environmental Resources. The amended complaint sought declaratory and injunctive relief against enforcement of certain provisions of Pennsylvania's Bituminous Mine Subsidence and Land Conservation Act, 52 Pa. Cons. Stat. Ann. 1406.1 *et seq.* (Purdon Supp. 1986) (the "Subsidence Act" or "the Act"), enacted in 1966 in the exercise of the police power. *Id.* § 1406.3.

Petitioners challenged, *inter alia*, requirements of the Act (Section 4, 52 Pa. Cons. Stat. Ann. § 1406.4) and its implementing regulations (25 Pa. Admin. Code § 89.145, 89.146) that prohibit mining that causes subsidence damage to certain specified surface structures, and require coal operators to leave 50% of their coal in place for support under those protected structures and features. The complaint alleged that these provisions appropriated petitioners' private property without compensation, in violation of the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution. Amended Complaint ("Comp.") ¶ 50(c), Joint Appendix ("J.A.") 29.¹

¹ The complaint further alleged that provisions (Section 6 of the Act, 52 Pa. Cons. Stat. Ann. § 1406.6, and § 89.147(b) of the regulations) allowing the owner of a non-protected structure to purchase from a coal company, at a reasonable price, the coal that supports

Although these provisions of the Act had been in effect, essentially unchanged, since 1966, the complaint did not allege any specific "injury due to the enforcement of the statute." Appendix to Petition for *Certiorari* ("Pet. App.") 27a. Thus, the district court correctly noted that "the only question . . . is whether the mere enactment of the statute and regulations constitutes a taking. *Agins v. City of Tiburon*, 447 U.S. 255 (1980)." *Ibid.* The district court denied petitioners' motion for summary judgment.

The court found the challenged provisions of the Act and the regulations valid on their face, and entered judgment on all issues for defendants. Distinguishing the decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the court ruled that the Act's land use restrictions did not go so far as to constitute a taking. *Id.* at 32a-33a, 36a-41a.² The district court subsequently gave petitioners leave to conduct discovery on the question whether the law was invalid, not on its face, but as applied, *i.e.*, whether there was "a constitutionally infirm taking of plaintiffs [*sic*] investment backed expectations." Pet. App. 46a.

Upon the parties' joint motion, the district court certified for interlocutory appeal the questions whether the challenged provisions of the Act and the regulations: "(a) Violate the Rule of the *Mahon* decision[;] (2) Constitute *Per Se* Takings; [or] (3) Violate Article I § 10 of the Constitution of the United States." Pet. App. 47a.

the structure, impaired contractual rights in violation of the Contract Clause of the Constitution, Art. I, § 10. Comp. ¶ 56(a), J.A. 31. As explained below, this brief does not address that issue.

Petitioners have abandoned another taking claim and another contract claim that were presented to the district court and the court of appeals. Brief for Petitioners 9 n.9.

² The district court also rejected petitioners' Contract Clause challenge, because of the "significant and legitimate public purpose behind the regulations" and the reasonable relationship between the law's provisions and its public purpose. Pet. App. 31a.

The court of appeals affirmed the decision of the district court,³ rejecting petitioners' challenge to "the statutes on their face," while recognizing that "[t]he as-applied challenge remains for disposition in the district court." Pet. App. 4a n. 3. The court agreed with the district court that *Pennsylvania Coal* was not dispositive of the takings issue. Citing, *inter alia*, *Andrus v. Allard*, 444 U.S. 51 (1979), and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the court specifically held that the support requirements did not constitute a taking, because "plaintiffs still possess[ed] valuable mineral rights that enable[d] them profitably to mine coal." Pet. App. 16a. Thus, the Act's requirements were "more properly viewed as part of a public program adjusting the benefits and burdens of economic life to promote the common good and to prevent certain serious and identifiable harm to the general public." *Id.* at 15a.

This Court agreed to review the takings question presented by the petition for *certiorari*: "Whether the court of appeals properly distinguished this Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), in holding that a state can compel mine operators to abandon their coal in the ground in order to serve the state's interest in economic development without violating the Takings Clause of the Fifth Amendment."

Amici suggest that, given the procedural posture of this case, the takings questions actually involved are:

Whether a state land use regulation can be challenged as a taking of private property within the

³ The opinion noted that the Pennsylvania program was in part a response to the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (1982 & Supp. 1983) § 1201 *et seq.* As the court explained, that Act permits a State to assume primary control over mine reclamation activities within its borders by adopting a regulatory scheme at least as stringent as the minimum guidelines set forth in the federal laws. Pennsylvania's program has been approved under this scheme. See 30 C.F.R. § 938.1-20 (1985).

meaning of the Just Compensation Clause of the Fifth Amendment.

Even if state land use regulation can be challenged as a taking under the Just Compensation Clause, whether a state law restricting the amount of coal that can be removed from beneath certain structures is, on its face, constitutionally invalid as a taking of private property.

Our brief addresses the proper analysis of these questions. We do not discuss the Contract Clause issue that is also presented in the petition, endorsing instead the able discussion in respondents' brief.

SUMMARY OF ARGUMENT

Amici address only the first question raised by the petition for *certiorari*, which challenges portions of the Subsidence Act and its implementing regulations on the ground that they take petitioners' property without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution. *Amici* submit, first, that the validity of the challenged regulations cannot be analyzed in terms of "taking" as that word is used in the context of eminent domain. Land use regulations are an exercise of the police power, not the power of eminent domain.

Petitioners rely on the Court's statement in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, that "if regulation goes too far it will be recognized as a taking." The reference to "taking" does not convert a regulatory exercise of the police power to an exercise of the quite different power of eminent domain. Rather, the word "taking," in *Pennsylvania Coal* and in later decisions of the Court, has been used to describe the conclusion that regulation is excessive. The determination whether land use regulation is excessive, and therefore invalid, has consistently been made according to the standards established for the exercise of the police power. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Amici urge the Court to take this opportunity to clarify the confusion that may result from the use of the word "taking" in connection with the constitutional evaluation of police power regulation. The concept of "taking," in the sense of the prohibition imposed by the Just Compensation Clause, has no place in the analysis of land use regulation.

Moreover, even if land use regulation could give rise to a Fifth Amendment taking claim, petitioners' facial challenge to the Subsidence Act's restrictions on their mining operations fails to make out such a claim. This Court's recent decisions have made it perfectly clear that the mere act of regulating does not give rise to a taking. *United States v. Riverside Bayview Homes*, 106 S.Ct. 455, 459 (1985). A facial challenge under the Fifth Amendment to a regulatory exercise of the police power will be sustained only if it is apparent that its effect is to prevent all economically viable use of the land. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981). Petitioners do not contend that the Subsidence Act prevents any such use. Therefore, substantiation of their claim requires direct evidence of the actual effect of the challenged regulation on a particular piece of property or property right. *E.g.*, *MacDonald, Sommer & Frates v. Yolo County*, No. 84-2015 (June 25, 1986).

ARGUMENT

I. THE VALIDITY OF LAND USE REGULATION IS NOT PROPERLY CHALLENGED AS A TAKING UNDER THE JUST COMPENSATION CLAUSE

Petitioners seek declaratory and injunctive relief against enforcement of the Subsidence Act based on allegations that it constitutes a "taking." Their prayer demonstrates the confusion that arises from use of the word "taking" in the context of a challenge to a regulatory enactment. The hallmark of the power of eminent domain is that through its exercise, the government may acquire private property interests by paying just compensation. If the government acquires (or, in some cases,

destroys) private property without paying just compensation, a violation of the Takings Clause results; and the government may be ordered to pay just compensation or to return the property to its private owner.⁴

By contrast, the appropriate remedy when government regulatory action is adjudged to be excessive (as petitioners contend it is in this case) is invalidation: an order that the regulation not be enforced, at least to the extent that it is found to be excessive. The declaration of invalidity does not give rise to a claim for just compensation for a "taking" in the eminent domain sense. In fact, it is apparent from the relief that petitioners seek that they use the word "taking" as a kind of shorthand reference to an unlawful use of the police power, rather than to the power of eminent domain.

Land use regulations are an exercise of the police power, not the power of eminent domain. Through the exercise of the power of eminent domain, the government actually acquires private property for public use. For such acquisitions, the Fifth and Fourteenth Amendments require the government—federal, state, or local—to pay the owner just compensation. When government exercises the power of eminent domain, it "acquire[s] unto itself a property right—an interest that is literally or effectively transferred and increases government's store of proprietary interests."⁵ Proprietary interests in land can be acquired in numerous ways, including actual condemnation proceedings,⁶ expropriation,⁷ physical occupa-

⁴ If the government actually acquires a possessory or other legal right to the property before returning it, just compensation would be due for the period of the government's ownership. *E.g.*, *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

⁵ Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 570 (1972).

⁶ *United States v. 50 Acres of Land*, 105 S.Ct. 451 (1984).

⁷ *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

tion,⁸ continuous and highly intrusive physical invasion,⁹ or the complete destruction of some kinds of property interests.¹⁰

But this Court has never held that regulation of land, *per se*, amounts to a taking.¹¹ Regulation "that merely re-

⁸ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *United States v. Cress*, 243 U.S. 316 (1917); *United States v. Lynah*, 188 U.S. 445 (1903); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871).

⁹ *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *United States v. Causby*, 328 U.S. 256 (1946). Less intrusive or continuous intrusions will not amount to a taking. *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980).

¹⁰ *Cf. Armstrong v. United States*, 364 U.S. 40 (1960). Even complete destruction of property, however, may be lawful as a police power measure. *Miller v. Schoene*, 276 U.S. 272 (1928); *cf. Mugler v. Kansas*, 123 U.S. 623 (1887).

¹¹ In *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Court held that zoning regulations were invalid as applied. The trial court dismissed the application for rezoning, in spite of the findings of the master hearing the case that no practical use could be made of the land within the applicable zoning and that the zoning did not promote the health, safety, convenience, or general welfare of the nearby residents. Based on the master's findings, the Court held that the zoning was invalid because it exceeded the City's zoning authority. The Court did not find a "taking" and did not award compensation. This result is perfectly consistent with the theory that we propose, that is, that land use restrictions should be reviewed as regulation, and if unauthorized, set aside, but the error does not amount to a taking.

Nectow remains, in any event, the only time the Court has ever invalidated a zoning restriction. See Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 Urb. L. 447, 454 (1983). (The author is of counsel on this brief.) See also *Hodel v. Va. Surf. Min. & Recl. Ass'n*, 452 U.S. 264 (1981) (steep slope mining); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) (historic landmark); *City of Eastlake v. Forest City Enter.*, 426 U.S. 668 (1976) (referendum on zoning); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (zoning for

stricts the use of property" (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982)) is an exercise of the police power, not the power of eminent domain. Through regulation, the government acquires no possessory or legal rights in property; it merely regulates the use of property to promote the public interest. Regulatory measures may, and often do, adjust property rights between competing private interests; some benefit at the expense of others. But because the government acts simply to mediate among competing private uses, and to limit one or the other if necessary, "the police or regulatory power passes no [proprietary] interest to the government."¹² A "transfer" of rights from one private owner to another does not transfer any rights to the government in its "ownership capacity" and therefore is not an exercise of the power of eminent domain.¹³

This Court has, of course, stated that "if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Many subsequent cases have repeated this statement as a formulation of the limitations on the government's regulatory power. The use of the word "taking" in the context of land use regulation may be useful as a shorthand for the conclusion that regulation has intruded too far on protected rights. *Amici* do not argue that regulation can never "go too far" in this sense. We submit, however, that the reference to a "taking" by regulation should not be used to suggest that anything other than generally applicable police power standards govern when

one-family dwelling); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (zoning); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (zoning).

¹² *Stoeckert*, *supra* note 5.

¹³ *Id.* at 570-71.

judging whether the regulation does "go too far."¹⁴ There is, in other words, nothing magical about land use regulation that distinguishes it from any other kind of police power regulation in the evaluation whether it goes too far.¹⁵

In upholding the constitutionality of land use regulation through zoning, this Court has recognized as much. In *Euclid v. Ambler Realty Co.*, 272 U.S. 365, the Court dismissed claims of grossly diminished property values and reduced business opportunities in favor of increased

¹⁴ The danger in using the word "taking" in the context of regulation is its implication that a constitutional violation will compel the government to purchase the property by payment of just compensation rather than cease enforcement. Professor Freilich (of counsel on this brief) has previously explained that perhaps the most important difference between the power of eminent domain and the police power is the proper remedy for unlawful government action: "Eminent domain 'takings' are to be given just compensation because they are a valid exercise of a sovereign power. Excessive police power regulation, on the other hand, without the authority and consent to compensate is *ultra vires* sovereign power and challenged on the basis of its *validity*." Freilich, *supra* note 11, at 461-62.

¹⁵ This conclusion is confirmed by cases challenging regulatory measures outside the area of land use. In *Andrus v. Allard*, 444 U.S. 51 (1979), for example, the Court rejected a "takings" challenge to regulations prohibiting commercial transactions in feathers of birds, as applied to birds that had been legally killed before they came under federal protection. The Court noted that "government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property." *Id.* at 65. See also *Connolly v. Pension Benefit Guaranty Corp.*, 106 S.Ct. 1018 (1986) (pension rights). These cases demonstrate that, in adjudicating the validity of regulatory schemes, the Court does not use the word "taking" in the sense that it has in eminent domain proceedings, where it refers to specific private property rights expropriated or invaded by the government for which compensation must be paid. Rather, the Court strikes a balance between public and private rights, and uses the term "taking" to describe an excessive use of the police power that amounts to an invasion of private rights disproportionately large in relation to the public interest served.

safety and security of home life; prevention of street accidents, especially to children; decreased noise and other conditions which produce or intensify nervous disorders; and preservation of a more favorable environment in which to raise children. *Id.* at 394. The Court held that land use regulation through zoning will not be unconstitutional unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. More recently, in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974), the Court held that land use regulation, as economic and social legislation, need only be "reasonable, not arbitrary" and rationally related to a permissible state objective. Economic impact on property rights or values, standing alone, is, of course, an insufficient basis for invalidation; for, as the Court noted in *Belle Terre*, "it is obvious that the scale of rental values rides on what we decide today." *Id.* at 9.

The law and regulations under review in this case closely resemble zoning restrictions, in that they similarly limit the extent of the permissible use of land. Petitioners' taking claim rests on what they characterize as the destruction of property rights in land: the mineral rights and the support estate, which, they allege, entitles them to mine without regard for the effect on the support of the surface.¹⁶ Just as the developer is engaged in the business of building and selling structures on his land, petitioners are engaged in the business of extracting and selling coal under land owned by others. In our view, petitioners' rights, like those of developers of land, are constitutionally subject to reasonable regulation. Petitioners have not alleged, much less proved, that Pennsylvania's regulation is arbitrary and unreasonable and

¹⁶ Respondents' brief fully explains the nature and scope of the support estate under Pennsylvania law, and we do not repeat that discussion here.

bears no "rational relationship to a [permissible] state objective." See *Belle Terre*, 416 U.S. at 8; see also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

Pennsylvania Coal, the source of the proposition that land use regulation can amount to a "taking," involved a statute that the majority construed as destroying a property interest in mining below the surface of the land. The Court noted that the statute, which prohibited mining "in places where the right to mine such coal has been reserved" (260 U.S. at 414), "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the [landowners]." *Ibid.* Examining the judgment of the legislature and the extent of the diminution in value of the coal company's property, the Court found that the public interest was limited and the destruction of the coal company's right substantial, and held that "the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the [company's] constitutionally protected rights." *Ibid.*¹⁷

The suit in *Pennsylvania Coal* was brought by the surface landowners for an injunction to prevent further mining by the coal company. The constitutional requirement that when government "takes" property it must pay just compensation, was not relevant because the State was not a party to the case. Thus, the reference to "taking" in that case merely denoted that the State's exercise of its police power was excessive and therefore illegal because of the destruction of property rights.

¹⁷ The district court and the court of appeals opinions in this case, and respondents' brief in this Court, clearly set forth the reasons why the finding of a "taking" in *Pennsylvania Coal* is not dispositive of the validity of Section 4 of the Subsidence Act and its implementing regulations. We will not repeat that discussion here.

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), clearly confirms this analysis. In *Goldblatt*, the town had enacted an ordinance prohibiting certain quarrying operations, and sued to enjoin Goldblatt from continuing his operations. Goldblatt defended on the ground that the ordinance was an unconstitutional taking of property. The Court noted that "[c]oncededly the ordinance completely prohibits a beneficial use to which the property has previously been devoted" (*id.* at 592) and, citing *Pennsylvania Coal*, stated that "governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation." *Id.* at 594. The Court nevertheless viewed the issue in the case as "whether the prohibition . . . is a valid exercise of the town's police power," which "connotes the time-tested conceptional limit of public encroachment upon private interests." *Ibid.* The Court specifically held that "[i]f this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." *Id.* at 592.¹⁸ The Court thus clarified *Pennsylvania Coal*'s meaning of "taking" in the context of assessing the validity of land use regulation.

Significantly, in many of the so-called takings cases, the issue separating the majority and dissenting opinions is simply the determination whether the regulation has gone "too far." The opinion that finds a measure valid refers to it as "regulation," while the other finds it invalid as a "taking." See, e.g., *Loretto, supra*; *Penn Central, supra*; *Pennsylvania Coal Co., supra*; see also *Andrus v. Allard*, 444 U.S. 51, 64 n.21 (noting that takings claim had been cast in the district court in terms of economic substantive due process); *Goldblatt v. Town of*

¹⁸ The Court ultimately held the ordinance valid because there was no evidence of the effect of the prohibition on the value of the property. See Part II, *infra*.

Hempstead, 369 U.S. at 594 ("There is no set formula to determine where regulation ends and taking begins."). The terminology of "taking" is unfortunate, as it tends to obscure the principle that land use regulation is an exercise not of the power of eminent domain, but of the police power, and that the validity of such regulation depends upon police power standards—as expressed in *Euclid* and *Belle Terre*—and not on the limitations on the power of eminent domain. Quite simply, a challenge to a land use regulation should be determined by examining whether it bears a reasonable relationship to the achievement of proper legislative objectives. *Amici* urge the Court to clarify that the validity of land use regulations is governed by police power standards, notwithstanding that the term "taking" may be used to summarize the conclusion that a particular restriction is excessive and therefore unenforceable with respect to particular property. *Amici* submit that the concept of "taking," in the sense of the prohibition imposed by the Just Compensation Clause, has no place in the analysis of land use regulation.

II. A CLAIM OF TAKING BY REGULATION CAN BE ESTABLISHED ONLY BY EVIDENCE CONCERNING THE EFFECT OF THE REGULATION ON A PARTICULAR PARCEL OF PROPERTY OR PROPERTY RIGHT

Petitioner's claims are not only improperly entitled under the Just Compensation Clause; they would be flawed even if they were treated as genuine takings claims. In numerous recent cases, the Court, citing *Pennsylvania Coal*, has pursued the question whether a particular land use restriction resulted in a taking.¹⁹ Each of these cases,

¹⁹ E.g., *MacDonald, Sommer & Frates v. Yolo County*, No. 84-2015 (June 25, 1986); *United States v. Riverside Bayview Homes*, 106 S.Ct. 455 (1985); *Williamson Cty. Reg'l Plan. Comm'n v. Hamilton Bank*, 105 S.Ct. 3108 (1985); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (1982); *Hodel v. Virginia Surf. Min. & Recl. Ass'n*, 452 U.S. 264 (1981); *Agins v. City of Tiburon*, 447 U.S. 255

however, like *Pennsylvania Coal* itself, makes clear that a taking can occur only through the definitive application of the challenged restriction to a specific piece of property.

The Fifth Amendment does not require compensation for the adoption of a regulatory policy. A taking can occur only when actual property rights are physically invaded or, in some circumstances, destroyed by conduct implementing such a policy. A regulatory policy, by itself, takes nothing. See *United States v. Riverside Bayview Homes*, 106 S.Ct. 455, 459 (1985) ("the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking").

This established principle was cogently summarized in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), a particularly apt precedent because it sustained regulation of coal mining operations. The district court in that case had upheld a facial challenge to two provisions of the federal Surface Mining Control and Reclamation Act under the Just Compensation Clause. The district court thought that Act's provisions requiring restoration of steep-slope surface mines to approximately their original contour effected an unconstitutional taking because they mandated an "economically and physically impossible" task; and because the value of the mined land after such restoration would have "diminished to practically nothing." *Id.* at 293. The district court also found that a section of the Act prohibiting mining in certain locations effected an unconstitutional taking, because it deprived owners of the right to use their land profitably. This Court reversed, because "neither appellees nor the [district] court identified any property in which appellees have an interest that has allegedly been taken by operation of the Act." *Id.* at 294. The Court concluded (*id.* at 295):

(1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the "mere enactment" of the Surface Mining Act constitutes a taking. See *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).²⁰

The Court went on to explain (*id.* at 295-96):

The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land" *Agins v. Tiburon*, *supra*, at 260. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). The Surface Mining Act easily survives scrutiny under this test.

In language directly applicable to the contention of petitioners in this case—that they are deprived of the right to remove some of their coal from the ground—the Court pointed out that because "the Act does not categorically prohibit [surface] coal mining and merely regulates the conditions under which such operations may be conducted" (*id.* at 296), it did not constitute a taking on its face.

Petitioners do not contend that the Act denies them "economically viable use" of their property; they do not discuss *Hodel*. Instead, they argue that the regulation "goes too far" in its restriction of their mining operations, citing *Pennsylvania Coal*. In this regard, their reliance on *Pennsylvania Coal* is misplaced, because the only question now before the Court is the facial validity of the Pennsylvania regulatory scheme. The question how far the regulation goes was neither certified to nor decided by the court of appeals. *Pennsylvania Coal* itself,

²⁰ As the district court correctly noted in this case, "the only question" before the court was "whether the mere enactment of the statute and regulations constitutes a taking," citing *Agins*. Pet. App. 27a; see p. 5, *supra*.

and the consistent rulings of this Court since that decision, make it plain that whether a regulation goes so far as to constitute a taking can be decided only by an appraisal of the effects of its enforcement on the property rights of a particular owner or owners.²¹

Most recently, in *MacDonald, Sommer & Frates v. Yolo County*, No. 84-2015 (June 25, 1986), the Court repeated the truism that it "cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." Slip op. at 7. *MacDonald* is the latest of a series of cases (*Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S.Ct. 3108 (1985); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980)) in which the Court has considered whether excessive zoning restrictions can give rise to a claim of compensation for a taking. In each case, the Court found it unnecessary and inappropriate to decide that ultimate issue, because of uncertainty concerning the actual effect of challenged restrictions on the property owner's rights.

In earlier decisions as well, the Court has consistently refused to entertain a taking claim without clear defini-

²¹ The *Pennsylvania Coal* case itself did not even involve a taking claim against the State, but was a private action to enjoin Pennsylvania Coal from mining operations that threatened subsidence of the plaintiffs' home. The plaintiffs relied on Pennsylvania's Kohler Act, which prohibited the mining of anthracite coal in such a way as to cause certain structures, including residences, to subside. This Court reversed the injunction granted to the plaintiffs by the Pennsylvania courts, ruling that the public interest in the statute was not sufficient to justify destruction of the subsurface rights that the Mahons had deeded to Pennsylvania Coal. Regardless of the principles enunciated in the case (see Part I, *supra*), it is clear that the *Pennsylvania Coal* case adjudicated an allegation concerning specific application of the regulatory measure to a specific property interest owned by Pennsylvania Coal.

We do not dwell in this brief on the distinctions between the Kohler Act and the statute under attack here, as they are dealt with extensively in respondents' brief.

tion of what was claimed to have been taken. Compare *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), rejecting a facial challenge to a zoning ordinance, with *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), enjoining application of a zoning ordinance to a particular piece of property after extensive findings concerning its effect on that property. See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962), rejecting a claim of taking based on regulatory prohibition of certain mining operations, in the absence of evidence that enforcement of the prohibition "will reduce the value of the lot in question."²² Petitioners cannot establish that regulation has gone "too far" without first showing the extent to which their interests have actually suffered. Such a showing cannot be made until administrative action is final (see *MacDonald*, *supra*; *Williamson County*, *supra*; *San Diego Gas & Electric*, *supra*), and has resulted in significant diminution of the value of their property interests.

The Court has made equally clear that the diminution must be substantial indeed. In *Andrus v. Allard*, 444 U.S. 51, 65 (1979), the Court explained that "[t]he Takings

²² In this case, petitioners remain free to introduce in the district court evidence concerning the reduction of the value of their property through enforcement of the challenged law and regulations. To obtain the injunctive relief that they seek, petitioners must prove that the regulatory scheme, as applied to their property, is clearly arbitrary and unreasonable and bears no rational relationship to a permissible state objective. See *Village of Belle Terre v. Boraas*, 416 U.S. at 8; see pp. 12-14, *supra*.

We note, however, that the record, as developed thus far, suggests that any diminution in the value of their property is minimal. The amount of coal left in the ground to support protected structures has been shown thus far to range from .04% to 9.4%. J.A. 284-87. Such impact is clearly insufficient as proof of excessive regulation or a "taking." See *Hadachek v. Sebastian*, 239 U.S. 394 (1915), upholding regulation that diminished property values by as much as 87½%; *Andrus v. Allard*, 444 U.S. 51, 66 (1979), rejecting takings claim because it was not clear that regulation would prevent any economic benefit.

Clause . . . preserves governmental power to regulate, subject only to the dictates of 'justice and fairness.'" In *Allard*, the owners of bird feathers had been deprived by the challenged regulation of the right to sell them, their only previous profitable use. In sustaining the regulations, the Court pointed out that they did not "compel the surrender of the artifacts," nor impose any "physical invasion or restraint upon them," but only imposed "a significant restriction . . . on one means of disposing of the artifacts." *Ibid.* The Court found it "crucial that [the owners] retain the rights to possess and transport their property, and to donate or devise the protected birds." *Id.* at 66. Moreover, the Court refused to assume that no economic benefit remained, suggesting that the feathers might be exhibited for an admission charge. *Ibid.*

Similarly, here, while petitioners have been precluded from removing some of their underground coal, they retain their ownership right to that coal. While they may lose one aspect of their support estate, that estate is not rendered valueless, for they retain important rights (spelled out in respondents' brief) other than the right to cause subsidence of a limited class of protected surface structures.

As this Court has noted, the Fifth Amendment "does not undertake . . . to socialize all losses, but those only which result from a taking of property. If damages from any other cause are to be absorbed by the public, they must be assumed by Act of [the legislature] and may not be awarded by the courts merely by implication from the constitutional provision." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

In this case, the limited record indicates not only that petitioners have not been deprived of "economically viable" use of their property, but that, on the contrary, there has been little, if any, diminution of the value of their prop-

erty rights. Petitioners' facial attack on the statute cannot take the place of the specific and substantial evidence the Court has consistently required in order to find a compensable "taking" within the meaning of the Just Compensation Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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AMICUS CURIAE

BRIEF

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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1985

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HELVETIA COAL COMPANY, ROCHESTER &
PITTSBURGH COAL COMPANY, U.S. STEEL
MINING CO., INC., UNITED STATES STEEL
CORPORATION, AND CONSOLIDATION COAL
COMPANY,**

Petitioners,

v.

**PETER S. DUNCAN, PHILIP ZULLO,
and THOMAS B. ALEXANDER,
Respondents.**

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

**MOTION FOR LEAVE TO FILE AMICUS BRIEF
AND BRIEF OF AMICI CURIAE PENNSYLVANIA
STATE GRANGE, CAWLM, THE ILLINOIS SOUTH
PROJECT AND THE CITIZENS' COAL ENFORCE-
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MOTION FOR LEAVE TO FILE AMICUS BRIEF

The Pennsylvania State Grange,
Citizens With Concern About Water Loss Due To
Mining Underground ("CAWLM"), the Illinois
South Project and the Citizens' Coal Enforce-
ment Group submit this Motion to file a brief
amicus curiae under Rule 36.

Respondents, by the Office of the Pennsylvania Attorney General, have consented to the filing of the amicus brief enclosed with this motion. Petitioner Coal Companies, however, have refused their consent and thus necessitated this Motion.

Each of the organizations joining in this motion represents victims of subsidence or is otherwise involved in dealing with the adverse effects of subsidence caused by underground mining.

The Pennsylvania State Grange represents 42,000 rural Pennsylvania residents in 545 local chapters. Consistent with its purpose of advancing the interests of agriculture and the values associated with the rural way of life, the Pennsylvania Grange has actively lobbied for effective subsidence regulation and has counseled farmers whose homes or farming operations have been damaged by subsidence.

CAWLM is an organization composed of residents and surface owners in Pennsylvania's bituminous coal producing region. CAWLM's purpose is to protect local citizens from the harm caused by the surface effects of underground mining. CAWLM's original purpose and main concern is with water supply loss and degradation caused by underground mining. Because subsidence and water supply interference are interrelated, CAWLM supports effective subsidence regulation. In order to protect the rights of residents and landowners more fully, CAWLM has increasingly found it necessary to work for better subsidence regulation and enforcement.

The Illinois South Project, Incorporated, is a non-profit organization which has worked for over a decade on the social, economic and environmental impacts of coal development in Illinois communities. In particular, it has worked actively on the issue of subsidence from underground coal

mining operations. The Illinois South Project provides technical assistance to coalfield residents seeking enforcement of state and federal mining laws relating to subsidence; participates in state and federal rulemaking regarding subsidence; publishes technical and legal materials on subsidence; and participates in litigation involving subsidence and underground mining regulation.

The Citizens' Coal Enforcement Group is a membership organization of citizens in the coal regions of Central and Southern Illinois who are concerned about the effects of coal mining on the local communities, land and environment. Members live over or near seven mines in Southern Illinois where subsidence is a major concern and subsidence from underground mining is the focus of the group's work. The Citizen's Coal Enforcement Group educates, trains and otherwise helps individuals to understand and monitor mining and reclamation activities and enforcement, and

participates in rulemaking and public policy debates concerning subsidence protection.

The amicus brief proposed to be filed by the organizations described above is, upon our information and belief, the only brief in this case that will present the position of the citizens, landowners, and groups most directly affected by subsidence and subsidence regulation. This otherwise unrepresented viewpoint and experience should aid the Court in the disposition of this case.

Respectfully submitted,

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The Citizens' Coal
Enforcement Group

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SUPREME COURT OF THE UNITED STATES

October Term, 1985

KEYSTONE BITUMINOUS COAL ASSOCIATION,
HELVETIA COAL COMPANY, ROCHESTER &
PITTSBURGH COAL COMPANY, U.S. STEEL
MINING CO., INC., UNITED STATES STEEL
CORPORATION, AND CONSOLIDATION COAL
COMPANY,

Petitioners,

v.

PETER S. DUNCAN, PHILIP ZULLO,
and THOMAS B. ALEXANDER,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF FOR AMICI CURIAE PENNSYLVANIA
STATE GRANGE, CAWLM, THE ILLINOIS SOUTH
PROJECT AND THE CITIZENS' COAL ENFORCE-
MENT GROUP

STATEMENT OF PARTY SUPPORTED

Amici Curiae Pennsylvania State
Grange, CAWLM, the Illinois South Project and
the Citizens' Coal Enforcement Group file this
brief in support of the Respondents.

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SUMMARY OF THE ARGUMENT

The fundamental principle that courts should not disturb valid exercises of the police power is dispositive of this case. Because the case involves cognizable harm to the public, the rational relationship test of Lawton v. Steele as authoritatively reaffirmed in Goldblatt v. Hempstead should apply.

There can be no serious question that the public interest requires control of subsidence damage from underground mining. In passing the challenged subsidence control statute, the Pennsylvania Legislature made explicit findings concerning the harm subsidence causes to the public health, safety, and welfare and to the economic development of Pennsylvania. The many types of harm wreaked by subsidence include the damage or destruction of private homes and public buildings; removal of land from productive agricultural use; interference with water supply; hindrance of land development; and erosion of the tax

base. The limited means chosen by Pennsylvania to control subsidence -- which require the prevention or mitigation of subsidence damage only in cases involving identified types of structures in place on or before 1966 -- bear a rational relationship to the police power purpose and fall far short of the complete lack of rational relationship required to invalidate police power regulation under Lawton/Goldblatt.

There is no reason in law or logic to except subsidence damage from the comprehensive scheme of mining regulation which has judicially and legislatively evolved in Pennsylvania as a necessary response to the severe and multiple harm which inadequately regulated coal mining has imposed on Pennsylvania's public and industry. Pennsylvania recognizes no property right in a public nuisance and analogously requires otherwise mineable and legally accessible coal to be left in place for various police power purposes, including

elimination of safety hazards from flooding (barriers), prevention of discharges of acid mine drainage (barriers), and maintenance of prescribed distances from residences and public facilities.

The fact that the Federal Surface Mining Control and Reclamation Act requires underground coal mining to control subsidence confirms the public interest involved in subsidence regulation. It also poses the potential of erratic and disruptive results if Pennsylvania's mining requirements are nullified by this Court. For one thing, Pennsylvania's federally-granted approval to administer and enforce a surface mining regulatory program would be seriously jeopardized in the absence of effective State subsidence regulation. Perhaps most importantly, this Court should allow subsidence regulation to develop in an atmosphere of cooperative and creative Federalism based on each coal State's formulation of subsidence regulations within

the framework of minimum Federal standards. From that perspective, it would be highly arbitrary to nullify the subsidence requirements of Pennsylvania, one of the States most affected by coal mining.

Petitioner Coal Companies waited almost two decades before challenging Pennsylvania's subsidence requirements, after a regulatory program was well in place and the public had developed an expectation of at least minimum protection from subsidence damage. This extremely belated lawsuit represents nothing more than an untimely collateral challenge to the subsidence requirements of the Federal Surface Mining Conservation and Reclamation Act.

The case upon which Coal Companies rest their claim -- Pennsylvania Coal Company v. Mahon -- is inapplicable here. As this Court stated in Goldblatt, the Mahon diminution of value test is only one formula which might be used in helping to evaluate the

rational relationship between police power goal and regulatory means under the Lawton test and is not conclusive. Utilizing the diminution of value test as an absolute standard makes no sense in any event because it allows for the creation of limited or single use property interests that are tailor-made to transform a regulation into a taking, such as the support interest which the Coal Companies are trying to fob off on this Court in this case as a full property interest. Moreover, the diminution of value test absolutely applied would require that at some point an individual's financial condition gives him a right to injure the public. Because the economic burden of nuisance elimination usually increases in proportion to the size of the injury, the paradox of such a rule would be that the greater the public injury, the greater the private individual's "right" not to abate it.

Decisive for the purposes of distinguishing Mahon is the fact that no significant public interests were held to be involved in that case. Amici contend that Mahon is inapplicable to the instant case, but if this Court should agree with Coal Companies that Mahon is indistinguishable amici request this Court to overrule that case to vindicate the overriding public interest now involved in subsidence regulation.

ARGUMENT

I. PENNSYLVANIA'S SUBSIDENCE REGULATIONS ARE A VALID EXERCISE OF THE POLICE POWER TO PREVENT OR MITIGATE THE ADVERSE EFFECTS OF SUBSIDENCE AND DO NOT CONSTITUTE A TAKING OF PROPERTY.

Pennsylvania's program to regulate subsidence from underground mining is a valid -- indeed necessary -- exercise of the police power to prevent or mitigate the many adverse effects of subsidence caused by underground mining. Implicitly conceding that this

proposition is correct, Coal Companies¹ in essence rest their case on but one case from the crowded field of taking law and one contention. The contention -- repeated numerous times in their brief -- is that "[t]here is no basis in the Taking Clause for considering the magnitude of the state's interest in determining whether there has been a taking of the property" (Pet. Brief at 13) and the case is Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).² Both the Coal Companies' contention and their interpre-

¹ Petitioners in this case consist of five coal companies and one association of bituminous coal producers and operators. For ease of reference, they will be collectively denominated as "Coal Companies" in this brief.

² Coal Companies even went so far below as to challenge the constitutionality of the provision of section 15 of the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §1406.15 (Purdon Supp. 1986), which specifically provides for compensation for support pillars of coal left under structures otherwise not covered by the Act. Coal Companies, however, have not sought review of that issue in this Court. (Pet. Brief at 11, n. 17)

tation of Mahon are extreme and lack support in history, relevant precedent, or the facts and context of this case.

A. The Lawton Test As Reaffirmed in Goldblatt Should Apply In This Case.

This case involves protection of the public by police power regulation against the types of harm generally associated with the term "nuisance" -- the adverse effects of subsidence include damage to houses, land and crops, interference with water supplies and the creation of unsafe conditions.³ Goldblatt v. Hempstead, 369 U.S. 590 (1962) provides the authoritative method of analysis for cases such as the instant one which involve claims of taking stemming from public regulation of

³ Even if the adverse effects of subsidence did not fall within the traditional categories of common law nuisance, it would make no significant difference. See Goldblatt v. Hempstead, 369 U.S. 590, 593 (1962) (citing with approval Reinman v. Little Rock, 237 U.S. 171 (1915)).

For a description of the adverse effects of subsidence see §I(B), infra.

harmful uses of property. Goldblatt involved a surface mining operation which had been extracting sand and gravel from the same property since 1927 and had been excavating at or below the water table even before the end of the first year of operation. 369 U.S. at 591. Despite the fact of the quarry's long-continued lawful use, Goldblatt upheld against taking challenges a municipal ordinance which was amended in 1959 to prohibit any excavation below the water table and which had the effect of putting the quarry out of business.⁴ 369 U.S. at 592, 596-597, 598.

In reaching its result, this Court in Goldblatt emphatically reaffirmed the test formulated in Lawton v. Steele:

⁴ The quarry in Goldblatt was in an area of expanding population which presumably increased its nuisance effect. See 369 U.S. at 591. The situation is parallel to subsidence regulation, where increasing urbanization or at least more concentrated land use patterns in the past decades has led to increased harm from subsidence and a concomitantly heightened necessity to regulate its adverse effects.

The classic statement of the rule in Lawton v. Steele, 152 U.S. 133, 137 (1894), is still valid today:

'To justify the State in ...interposing its authority in behalf of the public, it must appear, first, that the interests of the public... require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' 369 U.S. at 594-595.

In reaffirming the Lawton test, Goldblatt emphasized that "[t]he term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests." 369 U.S. at 594. Furthermore, Goldblatt also quoted extensively from Mugler v. Kansas, 123 U.S. 623 (1887), which stands for the proposition that the valid exercise of the police power is exclusive of the power of eminent domain and that the state therefore need not compensate individual owners where the police

power is validly exercised. See 369 U.S. at 593.⁵

In defining a valid exercise of the police power, the Lawton test states a rule of rational relationship between the police power object to be obtained and the means necessary to achieve it. If Pennsylvania required, for example, that all the coal under a structure be left in place for subsidence purposes even though it was inarguably clear that it was not required for surface support, the regulation

⁵ In his dissent in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), Justice Rehnquist emphasized that that case did not involve regulation specifically directed to the noxious use of property. 438 U.S. at 144-145. Whatever the proper test for analyzing the taking claims in cases such as Penn Central and Kaiser Aetna v. United States, 444 U.S. 164 (1979), the cases are distinguishable from the instant one because they involve concepts of regulation whose purpose goes beyond traditionally regulated use or obvious categories of harm and whose means may be indirect or novel. This basis for distinction does not, of course, describe a limitation on the definition of the police power. Penn Central, 438 U.S. 133-134 n.30; see also Berman v. Parker, 348 U.S. 26, 32 (1954).

would constitute an invalid exercise of the police power.

One method of evaluating whether a police power regulation is rationally related to its pronounced purpose -- the second part of the Lawton test -- is to compare property values prior to and after the imposition of the regulation. It was in that specific context that Goldblatt cited Mahon. 369 U.S. at 594. Goldblatt took pains to qualify its citation of Mahon by noting that the diminution of value formula "is by no means conclusive". Ibid. Goldblatt then went on to cite the case of Hadachek v. Sebastian, 239 U.S. 394 (1915), wherein strict regulation of brick manufacture in conjunction with clay mining resulted in an 88 percent decrease in property value, from \$800,000 to \$60,000. Ibid. Accord, e.g., Consolidated Rock Products v. Los Angeles, 371 U.S. 36 (1962) (dismissing appeal; case reported below at 57

Cal. 2d 515, 370 P.2d 342 (1962); Miller v. Schoene, 276 U.S. 272 (1928).

To employ the diminution of value test as an absolute limitation on the police power -- as opposed to utilizing it as merely one factor to be considered in evaluating the rational relationship between the police power goal and means -- makes no sense. For one thing, it enables parties to devise single or limited use property interests that transform a regulation into a taking. The instant case -- wherein Coal Companies attempt to equate by sleight-of-hand their limited support interest with a full property interest -- is a perfect example of the type of abuse an expanded diminution of value test will invite. For another, the broad application of the diminution of value test would require that at some point an individual's financial condition gives him a right to injure the public. The paradox of such a rule is that the greater the public injury, the greater the private indiv-

idual's "right" not to abate it, since the economic burden of nuisance elimination usually increases in proportion to the size of the injury. Someone who creates a serious hazardous waste problem on his property, to take one example, should not be able to legitimately claim a taking on the sole basis that the cost of abatement may equal or exceed the value of the property. It is not severity, but unnecessary severity, patently beyond the necessities of the case, that invalidates a regulation as an unreasonable, unduly oppressive use of the police power. See 369 U.S. at 594-595.

The initial obstacle to Coal Companies' interpretation of Mahon and their contention that taking analysis relates only to the impact of the regulation on an individual's property rights is undoubtedly the words of Justice Holmes himself. In Erie R.R. Co. v. Public Utility Commissioners, 254 U.S. 394 (1921), Justice Holmes upheld an

order requiring a railroad to improve grade crossings against the company's claim that it was unreasonable to require it to spend over two million dollars when it only had \$100,000 available. In response to the railroad's claim, inter alia, that the order constituted a taking, Holmes conceded an extremely wide latitude to the police power:

[T]he State. . . .has a constitutional right to insist that they [railroads] shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger.... That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist on it, and neither prospective bankruptcy nor engagement in interstate commerce can take away the fundamental right of the sovereign of the soil (citation omitted). (emphasis supplied) 254 U.S. at 410-411.

Consistent with the latitude Holmes allowed to the police power in Erie, Holmes never held that a taking existed in any case but Mahon. Mahon itself is not inconsistent with the Lawton test. The first part of the Lawton

test requires that in order to be deemed valid police power regulation must protect public interests. In Mahon, as Holmes specifically found, only private, not public interests were significantly involved. See 260 U.S. at 413-414.

B. Pennsylvania Has A Strong Public Interest In Controlling The Harmful Effects of Subsidence.

As a threshold matter, those who challenge police power regulations as unconstitutional bear a heavy burden of proof. E.g., Goldblatt, 369 at 596; Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976), U.S. v. Carolene Products Co., 304 U.S. 144, 154 (1938). Moreover, one qualification or caution concerning the Lawton test is that the greatest deference is owed legislative judgment defining the public interest and that debatable questions are for the legislature, not the courts, to decide. E.g., North Dakota Pharmacy Bd. v. Snyder's Stores, 414 U.S. 156,

154-167 (1973); Goldblatt, 369 at 596; Berman v. Parker, 348 U.S. 26, 32 (1954).

The Pennsylvania legislature made explicit findings concerning the harmful effects of subsidence from underground mining. Section 3 of the Bituminous Mine Subsidence and Land Conservation Act ("Pa. Subsidence Act"), 52 P.S. §1406.3 (Purdon Supp. 1986). Those findings included the threat subsidence poses to the public health, safety and welfare and to the tax base of affected communities.

Even if there were no legislative findings, no serious question exists as to the harmful effects caused by subsidence, which range from the horrific to the debilitatingly routine. Stories and pictures of vehicles swallowed up by collapsed roadbeds document one of the more dramatic effects of subsidence. Other, cumulative damage is more debilitating in the long run. Subsidence causes substantial damage to foundations,

walls, other structural members and the integrity of houses and buildings. It can cause the contents of oil and gas wells to migrate into mines, aquifers, and basements. Subsidence can cause severance of water, sewage and gas lines and telephone and electric cables. Subsidence also causes sinkholes or troughs in land which make land development difficult or impossible.⁶

Subsidence also causes disruption in farming because subsided areas cannot be plowed or properly prepared and crops will not grow there. Furthermore, the fracturing of the mineral strata associated with subsidence adversely affects water supply and distribution. In Pennsylvania, for example,

⁶ Subsidence takes somewhat different forms depending upon the type of underground mining conducted. For example, the subsidence associated with room and pillar mining tends to occur as sinkholes; that associated with long wall (panel) mining as troughs.

subsidence causes loss of groundwater and surface ponds. In Southern Illinois, by contrast and as a result of its flat topography and high water table, subsidence causes pooling and the creation of huge ponds on the surface. See generally, Mavrolas and Schechtman, Coal Mine Subsidence (1982); Blazey and Strain, Deep Mine Subsidence - State Law and the Federal Response, 1 Eastern Mineral Law Foundation 1, 1-5 (1980).

Especially when compared with the putatively de minimus public interest involved in Goldblatt (see 369 U.S. at 595), the public interest involved in controlling subsidence is clear and immediate. The limited means Pennsylvania has chosen to accomplish subsidence regulation are well within the reasonable relationship test of Lawton. Instead of attempting to require prevention and control of all subsidence as the police power would allow and wise public policy might suggest, Pennsylvania only requires that coal be left

in place to protect certain categories of structures in place on or before the effective date of the Pa. Subsidence Act (April 27, 1966). Sections 4, 5, and 6 of the Act, 52 P.S. §§1406.4, 1406.5 and 1406.6. For structures and affected property left unprotected by section 4, the Act only authorizes the surface owner to purchase the coal necessary for subsidence protection. See §15 of the Pa. Subsidence Act, 52 P.S. §1406.15.

II. EXCEPTING SUBSIDENCE REQUIREMENTS FROM THE OTHERWISE PERVASIVE REGULATION OF COAL MINING IS AGAINST PUBLIC POLICY AND WILL UPSET THE FEDERAL AND STATE REGULATORY STRUCTURE.

Coal Companies attempt to portray this case in terms of an isolated individual surface owner and individual mining company while ignoring the broader public interest involved and the pervasive regulation of the mining industry which has developed as a necessary response to widespread environmental harm

caused by coal mining.⁷ Although amici contend that Pennsylvania's subsidence requirements are patently constitutional for the reasons discussed in §I, above, we believe that description of the broader background of this case may be helpful to this Court.

⁷ Because private contractual arrangements are subject to police power requirements, questions concerning private arrangements and the validity and construction of deed provisions relating to purported waivers of support are not at issue here. Amici note for the record, however, that "waiver of support" provisions were in almost all cases not the subject of free negotiation between the parties. Such provisions date from the turn of the century and represent a kind of fossilized remnant of the company town mentality, a relic of an era when coal companies exercised control of the services and property in the mining towns. At that time, coal companies, along with land speculators, began to sell property from which the mineral rights had been severed. Residents of coal counties who desired to purchase property had little choice but to accept the deed restrictions. At that time, also, coal mining had not been fully developed -- the prospect of mining activity under the property often seemed remote and the effects of subsidence were not as well known as they are today. Cf. Section 3(2) of the Pa. Subsidence Act, 52 P.S. §1406.03(2) (Purdon Supp. 1986) (Legislative finding that damage from mine subsidence has seriously impeded land development in Pennsylvania).

- A. Pennsylvania Comprehensively Regulates Mining And In So Doing, Requires Coal To Be Left In Place For Various Police Power Purposes Regardless Of The Property Interest In The Coal.

Pennsylvania has a long history of damage from coal mining. An early and aberrational Pennsylvania case on the subject actually upheld a proposition similar to the one the Coal Companies urge upon this Court exactly one hundred years later. In Pennsylvania Coal Co. v. Sanderson, the Pennsylvania Supreme Court held that coal mining was a natural use of land and that the mining company had in effect a property right to channel untreated and highly polluting acid mine drainage into a receiving stream. Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126 (1886). The Pennsylvania courts soon modified and negated that decision and held that there was no property right in a condition giving use to public harm. See, e.g., Pennsylvania Railroad Co. v. Sagamore Coal Co., 281 Pa. 233, 249 (1924), cert. den. sub

nom. Sagamore Coal Co. v. Mountain Water Supply Co., 267 U.S. 592 (1924). Accord, e.g., Nolan v. Jones, 263 Pa. 124, 106 A. 235 (1919). Sanderson was finally explicitly overruled -- and the principle that no property right exists in a public nuisance no matter how long in existence, emphatically reaffirmed -- in Commonwealth v. Barnes & Tucker Co., 455 Pa. 392, 411, 415, 319 A.2d 871, 881, 884 (1974); see also Commonwealth v. Barnes & Tucker Co. 472 Pa. 115, 371 A.2d 461 (1977), appeal dismissed, 434 U.S. 807 (1977).

It is noteworthy -- and given the Coal Companies' exclusive emphasis on property rights in this case, ironic -- that the early Pennsylvania cases which attempted to control the harmful effects from mining were often brought by other business enterprises whose own property rights and economic activities were jeopardized by harm caused by coal mining operations.

Parallel to the development of judicial precedent sanctioning stringent regulation of the mining industry, the Pennsylvania legislature explicitly recognized the severe and continuing harm to the public and the economy caused by coal mining (for example, over 3,000 miles of Pennsylvania's streams were destroyed by acid mine drainage), and responded by passing new legislation and strengthening amendments to provide for the comprehensive regulation of mining.⁸ In 1965, for example, Pennsylvania significantly broadened the requirements of the Clean Streams Law relating to mining⁹ and in the next year passed the Pa. Subsidence Act.

The key point for the purposes of this case is that several different portions of

⁸ The evolution of Pennsylvania's statutory and case law regarding the pollution effects of coal mining is traced in Commonwealth v. Harmar Coal Co., 452 Pa. 77, 83-86, 306 A.2d 308, 312-313 (1973), appeal dismissed, 415 U.S. 903 (1974).

⁹ See n.8, supra.

Pennsylvania's mining requirements mandate that coal be left in place and mining forgone in order to afford some protection to the public. (See J.A. 92-93) Leaving coal-in-place to form barriers is a fundamental requirement for effective pollution control in underground mines and is routinely imposed upon coal companies in Pennsylvania. Likewise, barrier retention is required by Pennsylvania's mine safety laws in order to prevent mine flooding. Furthermore, Pennsylvania's surface mining law prohibits mining within specified distances of residences, parks, etc., and thus requires otherwise mineable coal to be forgone in the public interest.¹⁰ The fact that the operator may have valid mining rights to the coal that must be forgone does not confer any right to mine contrary to Pennsylvania's police power

¹⁰ See §4.2(c) of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4b(c) (Purdon Supp. 1986).

requirements. It is absurd to suggest that the lives of miners, the supply of water to the public, and the safety of homes can be put in jeopardy by contracts "authorizing" what is validly prohibited by the police power.

In Plymouth Coal v. Pennsylvania, 232 U.S. 531 (1914), this Court upheld a Pennsylvania statute requiring coal to be left in place as barriers for safety reasons. In Harger v. Dept. of Envir. Resources, 9 Pa. Cmwlth. Ct. 482, 308 A.2d 171 (1973), the Pennsylvania Commonwealth Court held that Pennsylvania's prohibition against mining within three hundred feet of an occupied dwelling could not be considered an acquisition of property by the Commonwealth and thus rejected the mining lessee's claim for assessment of damages. Professors McGinley and Barrett encapsulate the point well:

An expectation of the right to exploit property at the expense of others, not parties to the transaction, is not entitled to constitutional protection when the public may be harmed by the

exercise of such rights. It has long been established that rights subject to state restriction cannot be removed from the State's jurisdiction merely by incorporating those rights into a contract. McGinley and Barrett, Pennsylvania Coal Company v. Mahon Revisited, 16 Tulsa L.J. 418, 441 (1981).

There is thus no reason in law or logic to grant the pervasively regulated mining industry some special dispensation from subsidence requirements when analogous regulations have been held to be valid and are in full force and effect. Indeed, the opposite is true -- subsidence has a direct and immediate effect on people's lives and property and must be regulated in the public interest. Analogously, protection of the surface through post-mining reclamation is one of the strongest mandates in mining regulation. See, e.g., §4(a)(2)E of the Surface Mining Conservation and Reclamation Act, 52 P.S. 1396.4(a)(2)E (Purdon Supp. 1986).

The lack of merit in the Coal Companies' position is compounded by the fact

that they waited almost twenty years before mounting this belated challenge to Pennsylvania's subsidence requirements. Coal Companies have operated under the law for two decades and the public has built up an expectation that they will be afforded at least the minimum protection from subsidence damage required by Pennsylvania law. The judicial nullification of Pennsylvania's subsidence requirements at this late date would represent a radical break in the scheme of mining regulation as it has developed and, as pointed out above, would be inconsistent with valid well-established analogous requirements.

B. Subsidence Protection Is Mandated By Federal, As Well As State law.

Even if the Coal Companies prevail in the instant case, they would still be subject to subsidence regulation under Federal law.

In response to the serious environmental problems caused by coal mining, Congress

passed a comprehensive surface mining act in 1977. Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), §101 et seq., 30 U.S.C. §1201. SMCRA regulates the surface effects of underground coal mining and prescribes that every permit issued under its requirements provide for subsidence protection.¹¹

¹¹ Section 516 of SMCRA, 30 U.S.C. §1266 regulates the surface effects of underground coal operations. The requirement for incorporating subsidence protection into permits under SMCRA is contained in §516(b)(1), 30 U.S.C. §1266(b)(1):

(b) Permit requirements

Each permit issued under any approved State of Federal program pursuant to this chapter and relating to underground coal mining shall require the operator to -

(1) adopt measures consistent with known technology in order to prevent subsidence causing material damage to the extent technologically and economically feasible, maximize mine stability, and maintain the value and reasonably foreseeable use of such surface lands, except in those instances where the mining technology used requires planned subsidence in a predictable and controlled manner: Provided, That nothing in this subsection shall be construed to

SMCRA's requirements are relevant to this case in several respects. First, they confirm that coal mining is a pervasively regulated industry even at the federal level and highlight the arbitrariness of excepting subsidence regulation from the general police power regulation of the industry.

Second, SMCRA's subsidence requirements emphasize the public interest in subsidence regulation and thus its validity as an exercise of the police power. This Court recognized the public interest involved and the validity of SMCRA's requirement when it sustained SMCRA against a facial Constitutional challenge in Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264 (1981) and Hodel v. Indiana, 452 U.S. 314 (1981).

Third, reference to SMCRA requirements highlights the irregular and inefficient con-

prohibit the standard method of room and pillar mining.

sequences of nullification of Pennsylvania's subsidence requirements by this Court. Even if Pennsylvania's requirements were nullified, Pennsylvania coal companies would still have to provide subsidence protection under SMCRA. The principal difference would be that permits incorporating subsidence requirements would be issued by the Federal government instead of the current arrangement whereby they are issued by Pennsylvania under an approved program.¹²

¹² §503 of SMCRA, 30 U.S.C. §1253, provides that States may receive federal approval to assume primary responsibility for administering and enforcing the act. Pennsylvania has received such a "primacy" approval. That approval is qualified, however, by the Department of the Interior's finding that Pennsylvania's subsidence regulations are less effective than corresponding federal regulations because they only protect structures in place on or before April 27, 1966. 50 Fed. Reg. 45821 (Nov. 4, 1985). The Department of the Interior is currently reviewing its subsidence regulations. See In Re: Permanent Surface Mining Regulation II, No. 791144 (D. D.C. 1985) (Memorandum Opinion filed July 15, 1985). Whatever the outcome of these somewhat complicated proceedings, suffice it to say that Pennsylvania must continue to have subsidence requirements at least

Fourth, the existence of the SMCRA subsidence requirements seems to explain why it took two decades for the coal industry to challenge Pennsylvania's subsidence requirements. As Pennsylvania argued before both courts below, Coal Companies' challenge represents an untimely collateral attack on the subsidence provisions of SMCRA and the regulations thereunder, as well as on the approval of Pennsylvania's "primacy" program by the Department of the Interior. (See paragraphs 11-23 of the Jt. Stip. of Counsel (J.A. 83-86)).¹³ Amici urge this Court to

as effective as corresponding Federal ones in order to continue to administer and enforce its coal mining regulatory programs. (See generally, J.A. 83-86).

One of the explicit purposes of the Pa. Subsidence Act is to enable Pennsylvania to obtain "primacy". See Section 1 of the Act of Oct. 10, 1980, P.L. 874, amending §2 of the Pa. Subsidence Act, 52 P.S. §1406.2 (Purdon Supp. 1986).

¹³ SMCRA provides that all challenges to State program approvals under SMCRA must be appealed to the District Court for the District which includes the State capital.

accept that position and dismiss Coal Companies' Petition as improvidently granted or in the alternative to dismiss the case on that ground.

Finally, mining regulation in general and subsidence regulation in particular is in a state of dynamic development due largely to SMCRA, but also to the States own legitimate interest in controlling subsidence.¹⁴ This Court should not interfere in this process, but should allow the continued formulation of subsidence requirements by the States in a framework of cooperative and creative Federal-

Section 526 of SMCRA, 30 U.S.C. §1276. All challenges to Federal regulations must be brought in the District Court for the District of Columbia. Ibid. The appeal period in both cases is 60 days from the date of the action. Ibid.

¹⁴ State subsidence requirements differ substantially among themselves. See, e.g., Slagel, Subsidence Control: Dealing With State Subsidence Control Programs, Proceedings of the American Mining Congress Coal Convention (1985) (Table 1)

ism responsive to both individual State problems and minimum Federal standards.

C. If Mahon Cannot Be Distinguished, It Should Be Overruled.

Amici have argued in this brief that Mahon is inapposite to the instant case. If this Court believes Mahon cannot be distinguished, amici urge this Court to overrule Mahon in order to vindicate the overriding public interest in controlling the harmful effects of subsidence and to uphold existing Federal-State regulatory programs in the crucial field of mining regulation.

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request this Court to affirm the decision of the Third Circuit Court of Appeals and uphold the validity of Pennsylvania's subsidence requirements.

Respectfully submitted,

KW James Rochow

K.W. JAMES ROCHOW

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Enforcement Group

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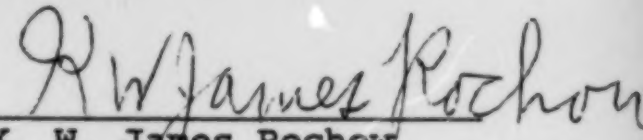
CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion for Leave to File Amicus Brief and Brief of Amici Curiae Pennsylvania State Grange, CAWLM, the Illinois South Project and the Citizens' Coal Enforcement Group, by mailing three copies of the same to each of the following persons this 28th day of July, 1986, by first class mail, postage prepaid.

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AMICUS CURIAE

BRIEF

13
No. 85-1092

Supreme Court, U.S.
FILED

JUL 28 1986

JOSEPH F. SPANIOLO, JR.
ERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

KEYSTONE BITUMINOUS COAL ASSOCIATION, et al.,
Petitioners,

VS.

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On Writ of Certiorari to the United States
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Amici Curiae Brief of State of California ex rel.
John K. Van de Kamp, Attorney General, and the
California Coastal Commission, the States of Arkansas, Florida,
Hawaii, Indiana, Kansas, Louisiana, Maine, Maryland,
Massachusetts, Michigan, Minnesota, Mississippi, Missouri,
Nebraska, New Hampshire, New Jersey, New York, North Carolina,
Oklahoma, Oregon, South Dakota, Tennessee, Vermont,
Washington and Wisconsin

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No. 85-1092

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KEYSTONE BITUMINOUS COAL ASSOCIATION, et al.,
Petitioners,

VS.

PETER S. DUNCAN, et al.,
Respondents.

On Writ of Certiorari to the United States
 Court of Appeals for the Third Circuit

Amici Curiae Brief of State of California ex rel.
 John K. Van de Kamp, Attorney General, and the
 California Coastal Commission, the States of Arkansas, Florida,
 Hawaii, Indiana, Kansas, Louisiana, Maine, Maryland,
 Massachusetts, Michigan, Minnesota, Mississippi, Missouri,
 Nebraska, New Hampshire, New Jersey, New York, North Carolina,
 Oklahoma, Oregon, South Dakota, Tennessee, Vermont,
 Washington and Wisconsin

INTEREST OF AMICI

Amici respectfully file this brief in support of respondents pursuant to rule 36.4 of the Rules of the Supreme Court of the United States.

The 26 states which have joined as amici in this case, together with their political subdivisions, exercise a broad range of regulatory powers within their respective jurisdictions. Amici are charged with the delicate responsibility of balancing demands for economic growth and development against health and safety concerns and the need to preserve finite natural resources located within their borders. The nature of regulatory responsibilities with which amici are charged is diverse indeed: the setting of utility rates, the enactment of floodplain zoning measures, and the prevention of the sale of contaminated foods or drugs are merely illustrative. Affected natural resources run the gamut from wilderness areas to urban centers, coastal wetlands to rural farmlands. In the land use context, proposed development projects that amici review include residential subdivisions, commercial centers, recreational developments and—as herein—mineral mining projects. The power of state, regional and local governments to control untoward development has been recognized for generations. *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Mugler v. Kansas*, 123 U.S. 623 (1887). It has grown more important with the passage of time and the increasing complexity of society and technology.

The issues presented by this case are of fundamental importance to California and each of the other governmental entities joining in this brief. A decision holding that the statute and regulations enforced by respondents herein have violated the United States Constitution would seriously impair the ability of these states and their political subdivisions to carry out their diverse police power responsibilities. Adoption of petitioners' radical reformulation of takings contract jurisprudence would cripple amici's ability to perform regulatory functions upon which their citizens' health, safety and welfare quite literally depend.

STATEMENT OF THE CASE

Amici adopt respondents' statement of the case.¹

SUMMARY OF ARGUMENT

1. Regulations which prohibit or restrict noxious or hazardous uses of property cannot constitute a taking regardless of their economic impact as one cannot acquire a right to injure the public.

2. Petitioners fail to satisfy even one of the factors identified by this Court as relevant in conventional takings analysis. The governmental action consisted of regulation rather than physical occupation and was intended to prevent harm to the public. Petitioners could have had no "reasonable expectation" that they would forever be allowed to remove underground coal without regard to the surface impact. Since this is only a facial attack, petitioners cannot begin to show the type of concrete, specific economic effects of the statute and regulations required by this Court to prove a taking.

3. Contrary to petitioners' bald assertions, courts are fully entitled to consider the nature of the public interest involved when deciding whether a regulation constitutes a taking. Were petitioners' view to prevail, society would have no power to prevent injury to it or its members if the means of prevention would seriously injure the economic expectations of those who would cause the injury. The proposition that society must elevate

¹ Amici note that petitioners sought only equitable relief from the trial court. Accordingly, the question of whether monetary damages are a constitutionally compelled remedy to cure a "regulatory taking" is not before the Court in this case. The Court has attempted without success to resolve the issue in several recent cases, and will visit the question again this term in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, Docket No. 85-1199. The position of several of these amici on the damages issue was most recently presented to the Court in their brief filed in *MacDonald, Sommer and Frates v. County of Yolo*, Docket No. 84-2015, ___ U.S. ___, 54 U.S.L.W. 4781 (1986).

the economic interests of a few over the well-being of society at large finds no support in the Constitution or the decisions of this Court.

4. The Contracts Clause does not override the police power so as to limit the state's ability to regulate harmful conduct simply because two private parties have made a contract about it.

ARGUMENT

I

NO UNCONSTITUTIONAL TAKING OF PETITIONERS' PROPERTY HAS TRANSPIRED AS A RESULT OF THE STATE'S HEALTH AND SAFETY-BASED SUBSIDENCE LAW. PETITIONERS' RADICAL ATTEMPT TO RECAST APPLICABLE TAKINGS ANALYSIS DOES VIOLENCE TO BOTH A CENTURY OF SUPREME COURT PRECEDENT AND COMMON LOGIC.

A. A Regulation the Principal Purpose of Which, as Here, Is to Prevent a Noxious or Hazardous Use Cannot Constitute an Unconstitutional Taking of Property.

Assuming arguendo that mere enactment of a regulation can result in an unconstitutional taking for which compensation must be awarded if the regulation is to continue in force,² not all

² The doctrine of "inverse condemnation" is of relatively recent vintage. Constitutional scholars have established that the drafters of the Just Compensation Clause "intended the clause to have narrow legal consequences: It was to apply only to the federal government and only to physical takings." Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 708 (1985); see also, F. Bosselman, D. Callies & J. Banta, *The Taking Issue* 97-104 (1973); Hagman and Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* 256, 272 (1978).

The notion that regulations can effect a "taking" of property was first articulated by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Subsequent commentators have argued persuasively that Justice Holmes used the term "taking" solely in a metaphorical sense, as a shorthand term for a regulation that was constitutionally excessive and therefore invalid. Costonis, *Fair Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 Columbia L.R. 1021, 1034-1035 (1975); Williams, et

exercises of the police power so qualify. Specifically, measures whose principal purpose is to prevent a noxious or hazardous use cannot, under longstanding precedent, result in a so-called "regulatory taking."

Over the past century of takings jurisprudence, this Court has generally rejected claims that regulatory measures result in an unconstitutional taking of property. Indeed, laws enacted for the purpose of promoting purely aesthetic objectives have been sustained in the face of repeated constitutional challenges. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Euclid v. Ambler Realty Co.*, *supra*, 272 U.S. 365; cf. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 570 (1981) (Rehnquist, J., dissenting). Yet since the nineteenth century courts have granted special deference to police power measures which are designed to eliminate or prevent tangible threats to the public's health, safety and welfare.³

al., *The White River Junction Manifesto*, 9 Vermont L.R. 193, 208-214 (1984). These sources note that the plaintiff in *Pennsylvania Coal* had brought suit against a private party rather than the state and, accordingly, that no action in inverse condemnation was or could have been stated. *Ibid.* Various state courts have taken the same view. *Fred F. French Invest. Co. v. City of New York*, 39 N.Y.2d 587, 594, 350 N.E.2d 381, 385 N.Y.Supp.2d 5, 8-9. *appeal dismissed* 429 U.S. 990 (1976); *Agins v. City of Tiburon*, 24 Cal.3d 266, 274, 157 Cal.Rptr. 372, 598 P.2d 25, 29, 276, *aff'd. on other grounds*, 447 U.S. 255 (1980). Indeed, this Court has recently indicated its ambivalence over whether to characterize an excessive regulation as a violation of the Taking Clause or, alternatively, of substantive due process guarantees. *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. —, 105 S.Ct. 3108, 3116-3124 (1985).

³ Ironically, modern zoning and open space ordinances—perhaps the most common form of aesthetic-based regulation—find their historical roots in land use measures designed to forestall far more tangible threats such as "fire, panic and other dangers . . ." Sax, *Some Thoughts on the Decline of Private Property*, 58 Wash. L.R. 481, 490-491 (1983). These ordinances still often serve their original purpose by, for example, separating inconsistent uses such as residential subdivisions and industrial plants using hazardous chemicals.

The distinction between police power measures which prevent harm, on the one hand, and those which secure a public good is a venerable one. It finds support in some of the most respected analyses of the Constitution and government. See, e.g., Freund, *The Police Power*, 546-547 (1904). Indeed, since law was made in Latin, a common principle has been that one must use one's property so as not to do injury to that of another: *Sic utere tuo ut alienum non loedas*. The U.S. Constitution and the Bill of Rights did not repeal this principle. They do not limit the government's power to prevent conduct by one individual which is injurious to the public interest. See e.g., *Atlantic Coast v. Goldsboro*, 232 U.S. 548, 558-59 (1914):

"Under such circumstances the State, in the exercise of the police power, may legitimately extend the application of the principle that underlies the maxim *sic utere tuo ut alienum non loedas*, so far as may be requisite for the protection of the public.

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. . . . And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law. . . ."

This Court has adhered to this principle consistently for a century. In *Mugler v. Kansas*, *supra*, 123 U.S. 623, the Court upheld against constitutional challenge the state's power to close a profitable brewery. The governmental action had been predicated on the view that production of alcoholic beverages constituted a quasi-nuisance threatening the local citizenry. *Welch v. Swasey*, 214 U.S. 91 (1909) upheld a municipal height limitation against claims that it effected a taking of private property. While such measures are now generally predicated primarily on aes-

thetic grounds, the law in *Welch* was upheld on the ground that excessively tall buildings in an urban setting constituted a special fire hazard. 214 U.S. at 107-08.

Similarly, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) dismissed the notion that a taking resulted when a city ordered a profitable brickyard closed. The city acted because the operation posed a threat to the health of those residing nearby. The Court observed that the power to abate a noxious use overcame the substantial economic impact upon the plaintiff, i.e., a 92.5 percent diminution in the value of his property. The Court observed that "we are dealing with one of the most essential powers of government—one that is the least limitable." *Id.* at 410. Nor does such an exercise of the police power pass muster under the Taking Clause only in cases of declared nuisances: "[G]ranting that the business was not a nuisance per se, it was clearly within the police power of the state to regulate it, 'and to that end to declare that in particular circumstances and in particular localities [the enterprise] shall be deemed a nuisance in fact and in law.'" *Id.* at 411, citing *Reinman v. Little Rock*, 237 U.S. 171 (1915).

A particularly apposite decision is *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914). There the plaintiff coal company mounted a wide-ranging constitutional attack on a Pennsylvania statute requiring operators of anthracite coal mines to leave sufficient coal in the ground to protect working miners. The Court's rejection of plaintiff's takings argument was based upon a proposition that is equally compelling today: "That the business of mining coal is attended with dangers that render it the proper subject of regulation by the State in the exercise of the police power is entirely settled." *Id.* at 540.

Pennsylvania Coal Co. v. Mahon did not signal a departure from this rule. Respondents analyze the *Pennsylvania Coal* decision at length in their brief, and no useful purpose would be served by repeating that discussion here. Suffice it to say that plaintiffs in that case brought suit against the private owner of a single surface estate. No public agency was involved; nor was the public health, safety and welfare invoked by the parties. As Justice Holmes noted:

"This is the case of a single private house . . . [U]sually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance . . . The damage is not common or public" (260 U.S. at 413.)

The critical distinction is driven home by two decisions contemporaneous with *Pennsylvania Coal*. In *Gorieb v. Fox*, 274 U.S. 603 (1927), Justice Holmes joined in a unanimous ruling that upheld municipal set-back regulations requiring landowners not to build within a given distance of the edge of their property. The plaintiff in *Gorieb* made an argument identical to that of petitioners herein: government's refusal to allow development of a portion of his property (there, as here, based in principal part on safety reasons) resulted in an unconstitutional taking. This Court rejected that notion, concluding that such measures "have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life." 274 U.S. at 608.

An even more pronounced example of government's power to abate health and safety problems notwithstanding the Taking Clause is *Miller v. Schoene*, 276 U.S. 272 (1928). There the Court unanimously held that the State of Virginia had acted properly in requiring plaintiffs to cut down a large number of red cedar trees, on the ground that the trees could otherwise communicate a serious plant disease to neighboring apple orchards. The state's action was predicated upon the severe threat that would otherwise be imposed upon a major facet of the state's agricultural economy. Justice Holmes again joined the Court's opinion, which held that government's obvious power to prevent public harm⁴ overcame any constitutional challenge:

"[T]he state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public. It will not do to say that

⁴ As in *Hadacheck*, the court in *Miller* found it irrelevant whether or not the infected cedars rose to the level of a nuisance. 276 U.S. at 280.

the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. . . . And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." 274 U.S. at 279-280.

Lest it be believed (as petitioners and others have sometimes argued) that this line of authority belongs exclusively to a bygone era, consider the modern takings cases. In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), for example, the Court sustained the municipality's prohibition of gravel pit mining below the municipal water table. The ordinance was found valid on health and safety grounds despite the fact that its effect was to prevent the owner from continuing a business that had been in operation since the first part of the century.

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) is without question the centerpiece of modern takings law. In its wide-ranging discussion in *Penn Central*, the Court analyzed each of the decisions set forth above and summarized the applicable rule as follows:

" '[T]aking' challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial individual harm." 438 U.S. at 125.

Notably, Justice Rehnquist dissented from the ruling in *Penn Central*, which upheld the application of New York's Landmark Preservation Law to preclude modern development of Grand Central Station. Finding that law to have unfairly conferred a considerable public benefit at the expense of the private landowner, Justice Rehnquist was nonetheless careful to distinguish between this situation and those in which government regulates to prevent a public harm:

"As early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use. (Citing *Mugler*, *Hadacheck* and *Goldblatt*, *supra*.)

"Nor is it relevant, where the government is merely prohibiting a noxious use of property, that the government would seem to be singling out a particular property owner. *Hadacheck*, *supra*, at 413 . . . The question is whether the forbidden use is dangerous to the safety, health, or welfare of others." 438 U.S. at 144-145 (footnote omitted).

Mugler is also cited with apparent approval by the majority in *Penn Central*, 438 U.S. at 126.

The distinction between the prevention of harm and provision for the public good was critical to the decision in *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979). There the Court struck down a federal requirement that the landowner allow public access as a condition of the government's approval of a dredging. Yet Justice Rehnquist, now speaking for the majority, was again careful to observe: "We have not the slightest doubt that the Government could have refused to allow such dredging *on the ground that it would have impaired navigation in the bay . . .*" 444 U.S. at 179 (emphasis added).

Perhaps the modern decision most directly on point is *Hodel v. Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264 (1981). Plaintiff coal operators in that case challenged the federal Surface Mining Control and Reclamation Act as, *inter alia*, a taking of their property without compensation. The district court, relying on *Pennsylvania Coal*, *supra*, had struck down portions of the Act, which greatly diminished the value of plaintiffs' properties by preventing mining in some locations and requiring restoration of the land's approximate original contours. Using language which is equally applicable to the present case, this Court reversed:

"[T]he Act does not categorically prohibit surface coal mining; it merely regulates the conditions under which such

operations may be conducted." 452 U.S. at 296 (footnote omitted).⁵

Hodel is dispositive of petitioners' taking challenge. Just as the federal mining statute scrutinized in *Hodel* was enacted to preclude adverse environmental impacts commonly associated with coal mining, so the Pennsylvania law at bar simply attempts to avoid public health and safety hazards attributable to bituminous coal operations in that state. Indeed, this would appear to be an easier case, given the immediacy and severity of the public threat posed relative to that identified in *Hodel*.

Innumerable state court precedents similarly reject the notion that a taking claim is viable in the face of a police power measure necessary to protect against public harm. See, e.g., *Consolidated Rock Products v. City of Los Angeles*, 57 Cal.2d 515, 20 Cal.Rptr. 638, 370 P.2d 342, appeal dismissed 371 U.S. 36 (1962) (rock and gravel quarry within city limits properly banned on public health and pollution hazard grounds, notwithstanding absence of alternative economic use); *State v. Dexter*, 32 Wash.2d 551, 202 P.2d 906, *aff'd per curiam* 338 U.S. 863 (1949) (regulation barring clear-cutting of timber and requiring reforestation constitutionally valid); *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1381-1382 (Fla. 1981) (no taking where development would have precipitated dredging and filling of bays and wetlands); *Turner v. County of Del Norte*, 24 Cal.App.3d 311, 101 Cal.Rptr. 93 (1972) (floodplain zoning measure prohibiting construction of permanent buildings not a taking in light of safety concerns upon which measure was based).

The water pollution cases are particularly instructive. In *Milardo v. Coastal Resources Management Council of Rhode Island*, 434 A.2d 266, (R.I. 1981), for example, the Rhode Island Supreme Court spurned a developer's challenge to a decision denying a sewage system permit, where evidence demonstrated the effect would be to damage a marsh:

⁵ Plaintiffs' taking challenge in *Hodel* was also deemed defective due to its facial nature—a flaw equally fatal in this case. 452 U.S. at 294-98; see discussion in part I (B)(3), *infra*.

"In essence, plaintiff is asserting a right not only to use his property but also to discharge waste into the surrounding area. This is a 'property right' that this court [has] refused to recognize . . . We believe that this denial was an exercise of the police power for protection of the public health and safety." 434 A.2d at 269-70; see also *Smoke Rise, Inc. v. Washington Suburban Sanitary Commission*, 400 F.Supp. 1369 (D.Md. 1975) (same); *Deltona Corp. v. United States*, 657 F.2d 1184, 1194 (Ct.Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982) (same).

The present case provides the Court with an opportunity to articulate explicitly what has been implicit throughout this long line of decisions: regulations enacted to prevent harm to the public cannot—as a matter of law—constitute a taking.

Such a per se rule is entirely consistent with current takings law. The Court only recently adopted such an absolute standard with respect to permanent physical occupations of private property by government. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court held that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." 458 U.S. at 426. Such a permanent physical occupation represents one end of the taking spectrum. At the other is a police power measure that is enacted merely to prevent demonstrable harm to the public which would otherwise occur as a result of private action. Just as the Court has not shrunk from adopting a per se rule in the case of permanent physical invasions (see 458 U.S. at 435, fn. 12), so should it reaffirm 100 years of takings jurisprudence by explicitly doing so in the regulatory context. Indeed, if government is to make rational choices to protect against noxious or dangerous uses of property, it must be able to make these choices unfettered by their effect on a particular person's investment. To say that a property owner has a right to impose a serious harm on his neighbors simply because he has invested a great deal of money in the expectation of being able to impose this harm makes no more sense than a rule saying that purchasers of Porsches are entitled to drive faster than purchasers

of Chevrolets because they have an investment in the right to drive fast.⁶

While the "ad hoc, factual inquiry" identified in *Penn Central*, *supra*, 438 U.S. at 123-24 may be required to analyze takings claims which fall closer to the middle of the spectrum between preventing harm and providing benefits,⁷ a per se rule is fully warranted in the present context.

Nor would application of a per se rule in the present context leave government regulation of this kind wholly unconstrained. Such measures are always subject to the requirement that they must be reasonably related to a legitimate governmental purpose. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *Hadacheck v. Sebastian*, *supra*, 239 U.S. at 412. Nor may government regulate with an improper discriminatory purpose in mind. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (racial discrimination). Nor may the government impose unfair procedures in making its

⁶ Indeed, such clarification of the law in this area would be most welcome. The continued uncertainty of takings law has been a subject of frustration to many informed observers. See, e.g., Williams, et al., *The White River Junction Manifesto*, 9 Vermont L.R. 193, 219-223 (1984); Sax, *Takings, Private Property and Public Rights*, 81 Yale L.J. 149 (1971); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harvard L.R. 1165, 1170 (1967).

⁷ In *Loretto*, the court was careful to exclude from its per se rule temporary and nonexclusive physical occupations of property. E.g. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), noted in *Loretto* at 458 U.S. at 435, fn. 12; see also *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958). Certain "regulatory takings" cases similarly warrant application of the multifaceted, ad hoc approach. The facts of *Penn Central* are a classic example inasmuch as one goal of the Landmark Law was to confer a public benefit with respect to property that was being used in a safe, socially productive way. In this case, however, Pennsylvania clearly acted to prevent harm rather than to provide a public benefit. It is difficult to conceive of another case in which application of the per se rule is more compelling.

decisions. See *Williamson County*, *supra*, ____ U.S. ____, 105 S.Ct. at 3127 (Stevens, J., concurring).

Respondent Pennsylvania's subsidence statute and implementing regulations are designed to prevent a clear and present danger to the citizens, economy and natural environment of that state. The statutory objectives of the law are undisputed, as are the imminence and magnitude of the threat posed by petitioners' unfettered mining operations. Under these circumstances, both a century of precedent and common logic compel the conclusion that no taking has transpired.⁸

B. A Careful Review of the Character of the Regulation at Issue, Petitioners' Reasonable Investment-Backed Expectations and the Economic Impact of the Subsidence Act Mandate the Conclusion That No Unconstitutional Taking of Property Exists in the Present Case.

Even ignoring the special nature of the regulations at issue in this case, no constitutional violation of petitioners' rights has been presented. Under the "ad hoc" analysis previously identified by the Court (see, e.g., *Penn Central*, *supra*, 438 U.S. 104; *Agins v. City of Tiburon*, *supra*, 447 U.S. 255; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984)), no taking exists.

Although the cases vary somewhat in describing the factors to be considered, one common formulation is: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Monsanto*,

⁸ While the current takings controversy focuses almost entirely on the regulation of real property, both states and the federal government are constantly faced with numerous other problems which could, should petitioners prevail, conceivably be seen as "takings." The State of Washington, for example, barred the sale of over-the-counter capsules after two of its citizens died of cyanide poisoning from such capsules. N.Y. Times, § 1, at 6, col. 6 (June 28, 1986). California this past year had to order the destruction of many thousands of watermelons and a great deal of cheese after poisoning incidents.

Governments might well be forced to let their citizens bear a little more risk from such incidents if they knew that any property that was destroyed might be the subject of a successful takings case.

supra, 467 U.S. at 1005.) Reviewing each of these factors demonstrates that petitioners have not suffered a taking.

1. The Character of the Police Power Measures at Issue, Which Limit Petitioners' Ability to Exploit a Natural Resource Rather Than Authorize Public Use of Private Property, Simply Does Not Support a Taking Claim.

Even if it is assumed that the character of the subsidence statute and implementing regulations, standing alone, somehow is insufficient to preclude a taking challenge, its nature dictates the same result under the ad hoc, factual inquiry of *Penn Central* and *Monsanto*.

In discussing this factor, the Court has noted that:

"[a] 'taking' may be more readily found when the interference with property can be characterized as a physical invasion by government [citation omitted], than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good. . . .

"In instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. . . ." *Penn Central*, *supra*, 438 U.S. at 124-25 (citations omitted).

In this case, of course, there has been no physical occupation of the subject property. Instead, the alleged "taking" is merely Pennsylvania's refusal to permit withdrawal of such bituminous coal deposits as would trigger surface subsidence and attendant threats to the public health, safety and economic welfare.

This, however, is only the beginning of the character-of-the-regulation inquiry. (Petitioners apparently dispute this. See part I(C)(2), *infra*.) Does the regulation, for example, require that private property be made available for public use as a condition of government's approval of development? Cf. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Does it authorize physical occupation of one person's property by another private entity? Cf.

Loretto v. Teleprompter Manhattan CATV Corp., *supra*, 458 U.S. 419. Measures of this type present far more compelling claims than, and must be juxtaposed against, ordinances which simply limit a landowner's ability to exploit fully his or her property interest. See, e.g., *Andrus v. Allard*, 444 U.S. 51 (1979), and *Euclid v. Ambler Realty Co.* *supra*, 272 U.S. 365.

It is inconceivable that a taking could be found given the nature of the statute and regulations at issue here. The Pennsylvania Legislature found the subsidence from coal mining was damaging and endangering the health, safety and welfare of the state's citizens as well as causing harm to the ability to develop the land in the future and to the fiscal health of affected municipalities. See 52 P.S.A. § 1406.3. As in *Hodel* and *Goldblatt*, *supra*, the reasons underlying the statute and regulation under review here fully justify any deleterious impact on petitioners' ability to exploit their property for private gain.

In conclusion, even if the special nature of the police power exercise involved here does not independently warrant rejection of petitioner's taking challenge, it still forms a critical element of the *Penn Central/Monsanto* test.⁹ Given the undisputed fact that the purpose and effect of the subsidence law is to prevent petitioners from causing serious and widespread public damage, petitioners' taking challenge must be rejected.

2. There Can Be No Reasonable Expectation of a Right to Extract Underground Coal Deposits When Such Extraction Will Cause Subsidence.

Returning to the *Penn Central/Monsanto* criteria, the next inquiry is whether the regulatory program at issue interferes with petitioners' reasonable, investment-backed expectations.

⁹ Alternatively, the identification of a police power measure designed and implemented to prevent public injury arising out of private acts could be viewed as a *fourth*, separate element of the *Penn Central/Monsanto* analysis. This Court has stated repeatedly that the specific factors identified in those decisions are not meant to be exclusive. E.g., *Penn Central*, *supra*, 438 U.S. at p. 124, characterizing the above-identified elements as "factors that have particular significance" (emphasis added).

It is undisputed that petitioners are entitled to mine a substantial proportion of their bituminous coal resources, notwithstanding the effect of the law under review. Stripped to its essentials, petitioners' argument is that they are constitutionally entitled to exploit *all* of the underground coal deposits irrespective of the ramifications of that action upon third parties, and that any attempt to limit their course is constitutionally defective.

Whether or not petitioners actually had any such "expectation," it certainly could not have been reasonable. On point, again, is the Court's decision in *Penn Central*:

"[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." 438 U.S. at 130.

While petitioners purchased support estates from the predecessors-in-interest of the current surface owners, the reasonable expectation value which attaches to those transactions is limited. It may be reasonable for a coal company to expect it can exploit the mineral resource at the expense of the party with whom it has contracted to purchase a support estate. But petitioners were (and are) entitled to *no* reasonable expectation that they would be able to profit at the expense of the sovereign and the public at large, who played no part in and secured no fiscal advantage as a result of these private real estate transactions.

It is by now axiomatic that "vested interest cannot be asserted against [the exercise of the police power] because of conditions once obtaining." *Hadacheck v. Sebastian*, *supra*, 239 U.S. at 410. The reason is obvious: Government must be able to meet evolving problems with effective solutions. As Justice Black observed in the context of a taking challenge:

"[T]he solution of the problems precipitated by these technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts." *United States v. Causby*, 328 U.S. 256, 274 (1946) (Black, J., dissenting).

Moreover, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal*, *supra*, 260 U.S. at 413.

Coupled with the necessarily elastic nature of the police power are petitioners' reasonable expectations concerning the exercise of that power. At least since 1913, petitioners cannot have entertained any serious belief that their ability to extract coal was unfettered by government's legitimate health and safety-related concerns. See *Plymouth Coal Co. v. Pennsylvania*, *supra*, 232 U.S. 531. To argue that Pennsylvania was barred from expanding the ambit of safety concerns to encompass residents and passersby as well as coal miners bespeaks a fundamental misperception of the necessary flexibility of the police power.

This case can be contrasted with the decision in *Ruckelshaus v. Monsanto Co.*, *supra*, 467 U.S. 986, which contains the most comprehensive explication of the "reasonable expectations" criterion. The court there held that Monsanto was entitled to rely on an explicit federal promise not to disclose the firm's trade secrets, and that public disclosure of those materials without Monsanto's consent would constitute a taking for which compensation was required. Prior to enactment of the statute, however, quite the opposite was true: Monsanto had *no* reasonable expectation that in the absence of an explicit guarantee by the sovereign, a member of a heavily-regulated industry would receive confidential treatment:

"Monsanto argues that the statute's requirement that a submitter give up its property interest in the data constitutes placing an unconstitutional condition on the right to a valuable Government benefit But Monsanto has not challenged the ability of the Federal Government to regulate the marketing and use of pesticides. Nor could Monsanto successfully make such a challenge, for such restrictions are the burdens we all must bear in exchange for 'the advantage of living and doing business in a civilized community.'" 467 U.S. at 1007; citations omitted.

The same can be said of petitioners' coal mining activities. Petitioners simply had no reasonable expectation that they would be free forever of the state's considerable power to impose reasonable restraints on their ability to extract underground coal deposits. These regulatory measures represent a measured response to a problem of alarming regional proportions. Petitioners had no reason to expect that Pennsylvania would refrain from carrying out its sovereign responsibilities.

3. Petitioners Have Failed to Demonstrate That They Have Suffered an Economic Impact Sufficient to Trigger the Taking Clause.

It is with respect to the third prong of the *Penn Central* analysis—the economic impact of Pennsylvania's regulatory program—that petitioners are perhaps most vulnerable. Even a cursory review of the applicable precedents reveal that petitioners' claim is without merit.

At the outset, petitioners are confronted with the fact that their taking challenge is not ripe for review. They concede that they have mounted only a *facial* attack on the validity of the Pennsylvania subsidence control program. Yet if one thing is certain from this Court's recent taking cases, it is that a facial challenge is a singularly inappropriate way in which to test a regulation under the Taking Clause:

"Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause . . . [T]his Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. *Those factors cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.*" *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, *supra*, 473 U.S. at 3119 (citation omitted; emphasis supplied.).

See also *MacDonald, Sommers and Frates v. County of Yolo*, *supra*, No. 84-2015, Slip Op. at 10-12; *Hodel v. Virginia Surface Mining and Reclamation Association*, *supra*, 452 U.S. at 298-97; *Agins v. City of Tiburon*, *supra*, 447 U.S. at 260.

Without knowing how the Pennsylvania statute and regulations will affect an individual firm's economic viability in a given case, it is impossible to gauge the program's economic impact. Petitioners' taking claim fails for this reason alone. *Ibid.*¹⁰

Even beyond the ripeness problem, petitioners' claims relating to the economic impact of the challenged measures do not withstand constitutional scrutiny. Of course, the fact that one is deprived of the highest and best economic use of his or her property hardly constitutes a taking. *Penn Central*, *supra*, 438 U.S. at 124; *Andrus v. Allard*, *supra*, 444 U.S. at 66. Like the analogous restrictions on surface coal mining analyzed in *Hodel*, *supra*, the regulations at bar do not *prohibit* the extraction of coal. Rather, they impose certain limits on the property owner's ability to exploit the resource consistent with the requirements of public health, safety and welfare. See *Hodel*, *supra*, 452 U.S. at 296.

Indeed, it is established that under certain circumstances a total or virtually total elimination of value does not transmute an

¹⁰ Petitioners' attempt without success to mask this deficiency in their brief. They make several general allegations, such as: (1) "the effect of the regulation is at least 50% of the support coal must remain unmined . . ." (Brief for Petitioners at 8); (2) the regulations "will make it infeasible for petitioners in certain situations to use the longwall method of coal extraction which has become for many coal mine operators the underground mining method of choice because it is more efficient and economical" (*ibid.*, citations omitted; emphasis added); (3) "the inability of petitioners to use this method of extraction will necessarily increase [p]etitioners' costs . . ." (*ibid.*); and (4) "in some circumstances, the inability to use the longwall method will make it economically impracticable to mine the coal petitioners own." *Id.* at 8, fn. 14; emphasis added.

Such vague and generalized allegations are not the stuff of which taking challenges are made. This case again demonstrates the wisdom of the Court's repeated insistence that constitutional claims of this nature be ripe for judicial determination.

otherwise valid exercise of the police power into a taking. See *Hadacheck v. Sebastian*, *supra*, 239 U.S. 394; *Goldblatt v. Town of Hempstead*, *supra*, 369 U.S. 590.¹¹

Petitioners further argue that Pennsylvania's subsidence program renders valueless the support estate they purchased from surface owners in years past. This argument is defective on two counts. First, it is by now settled that taking jurisprudence does not divide property interest into discrete segments; instead, the court must look to the totality of an owner's property interest to assess a regulation's impact under the Taking Clause. *Andrus v. Allard*, *supra*, 444 U.S. at 65, 66; *Penn Central*, *supra*, 438 U.S. at 130-131. Accordingly, the support estate must not be viewed in isolation but, rather, in conjunction with petitioners' mineral estate in the same parcel(s).¹²

¹¹ See also, *Sadowsky v. City of New York*, 732 F.2d 312, 317, 318 (2nd Cir. 1984); *Deltona Corp. v. United States*, 657 F.2d 1184, 1190 (Ct.Cl. 1981) *cert. denied*, 455 U.S. 1017 (1982); and *Furey v. City of Sacramento*, 592 F.Supp. 463, 471 (E.D. Cal. 1984), *aff'd* 780 F.2d 1448 (9th Cir. 1986):

"To the extent that the private interest is in the maximum exploitation of a piece of property, it is entitled to no weight whatsoever. [Citations omitted.] Rather the private interest protected by the law is the interest in retaining some economically viable use of the land. (*Penn Central Transportation Co. v. City of New York*, 438 U.S. at 130, 98 S.Ct. at 2662.) As noted above, the regulation challenged herein did not have the effect of depriving the plaintiff of all economically viable use of his land." (Emphasis that of the court.)

¹² Ironically, this principle finds its origins in Justice Brandeis' dissenting opinion in *Pennsylvania Coal v. Mahon*, *supra*, 260 U.S. at 419:

"If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole."

Second, petitioners continue to ignore the finding of the district court below that the support estate retains considerable value notwithstanding the Pennsylvania subsidence program. See 581 F.Supp. 511, 519, discussing petitioners' continuing right of access to mine coal, dig and ventilate mining shafts, etc. Even viewed in isolation, the support estate has thus not been deprived of all viable economic use.

It is instructive to compare this case with the Court's recent decision in *Andrus v. Allard*, *supra*, 444 U.S. 51. There, as here, government imposed a restriction on private property acquired before the regulatory measure was promulgated. Yet the program scrutinized in *Andrus* was far more restrictive than the present case, totally barring the purchase or sale of certain bird artifacts. The Court there unanimously upheld the federal statute against the claim that it effected an uncompensated taking of the plaintiff's property. "To require compensation in all such circumstances would effectively compel the government to regulate by purchase." 444 U.S. at 65 (emphasis that of the Court).

The significantly more modest restrictions invoked in Pennsylvania's subsidence statute and regulations similarly withstand constitutional scrutiny. As the Court said in *Andrus*:

"It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking. . . . But, within limits, that is a burden borne to secure 'the advantage of living and doing business in a civilized community.'" 444 U.S. at 66-67, quoting *Pennsylvania Coal Company v. Mahon*, *supra* 260 U.S. at 422 (Brandeis, J. dissenting).

The economic impact of respondent's program upon petitioners, to the extent it can be measured at all, is limited. Like the other elements of the standard articulated by the court in *Penn Central*, petitioners have failed to make the requisite constitutional showing.

C. Petitioners Propose a Multifaceted and Radical Change in Modern Takings Jurisprudence. Besides Contravening Established Precedent, the Suggested Changes Would Effectively Hamstring Government's Ability to Perform a Multitude of Vital Public Duties.

In addition to seeking misapplication of several settled principles to the facts in this case, petitioners propose a major change to existing takings law as developed by this Court. The modification they propose can be summarized as follows: (1) the sole constitutional inquiry should be the economic impact of a particular regulation upon an individual's property rights (see, e.g., Brief for Petitioners' at 22, 28-29 and esp. 29) and (2) the character of the governmental action involved should be irrelevant, except to distinguish between a physical invasion of property and an exercise of the regulatory power. *Id.* at 28.

Both of these propositions do violence to established constitutional precedent. To embrace them would cripple the ability of federal, state and local governments to perform a wide variety of vital sovereign functions, expose government to fiscal chaos, or both.¹³ Both of the novel theories posited by petitioners are analyzed briefly below.

¹³ Amici take strong exception to the proposition, advanced by petitioners, that the governmental entities before the Court in this and past, related cases accede to the broad philosophies advanced by petitioners. See Brief for Petitioners at 24, fn. 29. To the contrary, a broad coalition of state and local governments have joined in resisting the novel efforts of petitioners and their confederates to expand dramatically the scope of liability under the Taking Clause. See, e.g., amici curiae briefs filed by the States of California, et al., and the National Association of Counties, et al. in *MacDonald, Sommer & Frates v. County of Yolo*, *supra*, Docket No. 84-2015, decision reported at ____ U.S. ____, 54 U.S.L.W. 4782 (1986). These entities similarly argued against the similarly novel proposition that damages are an appropriate remedy to cure a regulatory measure found to be constitutionally excessive. *Ibid.* A fair reading of these briefs utterly rebut any notion that these amici find petitioners' views at all persuasive.

1. Takings Jurisprudence Does Not Permit Analysis of a Regulation's Economic Impact to the Exclusion of the Other Factors Identified by This Court.

Petitioners imply that the Court should turn its back on the multifaceted test it has carefully crafted over the years in *Penn Central* and related cases. In its stead, they argue, the inquiry should be limited to a straightforward review of a particular regulation's economic impact upon a given property. As indicated above, amici believe—and this Court's decisions hold—that in cases such as the present litigation, involving a police power measure expressly designed to prevent a noxious or harmful private activity, the “ad hoc” *Penn Central* analysis is inappropriate. In an ordered society, government must have the ability to prevent one person from injuring others even if the instrument causing the injury is classified by the law as real property. Petitioners' position, on the other hand, would make society at large a hostage to one individual's profit and loss statement.

This Court has previously observed that its “decisions sustaining other land-use regulations . . . uniformly reject the proposition that diminution in property value, standing alone can establish a ‘taking’ . . .” *Penn Central*, *supra*, 438 U.S. at 131; see also, *Andrus v. Allard*, *supra*, 444 U.S. at 66. The proper inquiry in most taking cases is instead a multifaceted, albeit sometimes subjective one. *Pruneyard Shopping Center v. Robins*, *supra*, 447 U.S. at 82-83.

The defects of petitioners' proposed standard are especially glaring in the case of new, as opposed to longstanding, uses of property. In *Andrus v. Allard*, *supra*, 444 U.S. at 66, the court noted that “loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a taking claim.” See also *MacLeod v. Santa Clara County*, 749 F.2d 541 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2705 (1985); *Mosca v. United States*, 417 F.2d 1382 (Ct.Cl. 1969), *cert. denied*, 399 U.S. 911 (1970).

An application of petitioner's narrow “economic impact” test in the land use context illustrates some of the difficulties and potentially absurd results. The owner of hillside property in an

area with a recent history of serious landslides would be constitutionally entitled to subdivide regardless of the danger if he could prove no other economically viable uses exist. Moreover, development of, e.g., arid land, unsuitable for agriculture and far from existing cities, requiring massive investment to provide basic urban services, could not be subjected to even the most traditional restrictions on density, height, etc., because compliance with them would preclude profitable development given the tremendous infrastructure costs. The "economic viability test" would thus prevent regulation on the land *most* ill-suited for development. Surely nothing in the Constitution requires such a result.

Petitioners' curious position is bottomed on the belief that government is *required* to allow uses that will make the ownership of real property profitable. This is not the law, any more than is government compelled by the Constitution to insure the profitability of any other type of investment.

2. Judicial Inquiry Into the Character of a Particular Regulation Is Far More Extensive Than Petitioners Would Have This Court Believe.

The second and equally troublesome modification proposed by petitioners is that the character of the governmental action under attack is essentially irrelevant in a takings inquiry. This view is manifestly incorrect.

Petitioners cite no authority for their novel proposition that this component of the *Penn Central/Monsanto* test is but a shorthand way of distinguishing between physical invasions of property, on the one hand, and "regulatory takings" on the other. Nor could they. In focusing on the nature of the governmental activity, the Court has traditionally undertaken a far more expansive analysis. In *Penn Central*, for example, the Court delved extensively into the features of New York's Landmarks Preservation Law. The provision in that ordinance allowing transfer of development rights, for example, was specifically cited as a factor ameliorating the otherwise harsh features of that measure. 438 U.S. at 131-137. Justice Rehnquist in dissent similarly opined that the requisite scrutiny of the challenged regulation was far more sophisticated than petitioners suggest here. 438 U.S. at 149-150; see also,

National Board of Young Men's Christian Association v. United States, 395 U.S. 85, 89-92 (1969).

Petitioners' argument is further undercut by *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*, 458 U.S. 419. According to petitioners, once the Court reached the simple conclusion that *Loretto* involved a physical occupation of private property rather than a regulatory measure, the *nature* of that occupation became irrelevant. Yet the Court in that case took great pains to distinguish a permanent and exclusive occupation from less pronounced types of "invasions." 458 U.S. at 435, fn. 12; see also 440. This discussion would have been irrelevant under the theory advanced by petitioners. Lower courts have similarly rejected petitioners' simplistic characterization of this facet of the *Penn Central/Monsanto* analysis. See, e.g. *Sadowsky v. City of New York*, *supra*, 732 F.2d at 318-319.

The pernicious nature of petitioners' argument can be understood by reference to their brief. They argue at one point that the Takings Clause ascribes no greater weight to any one public purpose than to another. Brief of Petitioners at 28. This view would lead to truly bizarre results. How can it be seriously argued, for example, that Pennsylvania's interest in preserving the lives of coal miners or surface homeowners (e.g., *Plymouth Coal Co. v. Pennsylvania*, *supra*, 232 U.S. 531) is equivalent, for purposes of analysis under the Takings Clause, to its desire for attractive mining sites? Such a stilted view ignores the need of governments to match the impact of a given regulatory measure to the severity of the problem encountered. Stated from petitioners' proprietary point of view, under their scenario the most compelling police power measures would be just as vulnerable to an inverse condemnation challenge as a borderline attempt by the state to confer a public benefit at private expense.

The Constitution does not admit to such arbitrary and wholly illogical strictures. This Court has traditionally been sensitive to the need of government for flexibility in responding to the day-to-day demands of modern society. The misleading and ultimately self-defeating importunings of petitioners should therefore be firmly rejected.

II

THE CONTRACT CLAUSE DOES NOT PREVENT THE STATE FROM EXERCISING THE POLICE POWER TO PROTECT HEALTH, SAFETY AND THE GENERAL WELFARE.

A. The Presumption That State Legislation Regulating Private Conduct So as to Prevent Damage to the Public Interest Does Not Disappear Upon the Signing of a Contract Between Two Private Parties.

While purporting to rely on a venerable line of precedent, petitioners' Contract Clause argument proposes a drastic alteration of the relationship between the courts and legislatures—one giving the courts much greater authority to strike down legislation which they deem unwise—and between the government and the people—one giving private parties the ability to shield themselves from the ordinary exercise of the police power.

Petitioners flatly assert that the existence of a contract shields one from much regulation: "In short, when contract rights have been severely impaired or destroyed, the presumption accorded state legislation does not apply. . . ." Brief for Petitioners at 40.

Thus, simply by signing a piece of paper one could substantially diminish the government's ability to act to protect the public interest. As soon as the ink was dry, any governmental action seriously affecting this contract—regardless of what the contract concerned—would have to clear the very much higher hurdles which petitioners would erect in the name of the Contract Clause. Were this the law, the countryside would be littered with contracts as businesses and individuals sought to place themselves beyond the reach of possible new laws. There would be a surge in the demand for lawyers skilled in both constitutional law and contracts. Contracts would be carefully drawn so that any meaningful regulation could be said to cause a "destruction" or "severe impairment." The ability to avoid the normal scope of the police power—that is, the police power applicable to those not clever enough or rich enough to have entered into insulating contracts—would be limitless. Drug manufacturers would sign contracts with wholesalers to provide continuing supply, just in case the Food and Drug Administration (FDA) should ever think it in

the public interest to ban distribution of a drug. The owner of a hazardous waste dump would be well advised to make long-term contracts to accept very toxic waste, just in case the future revealed problems leading to demands to close the site. In each case, the potential defendant could not be sure that a contract would be a sufficient shield—perhaps the government would actually be able to meet the test proposed by petitioners herein—but it would be foolish not to have a contract or two just to provide that little edge against the government.¹⁴

Fortunately, the proposition advanced by petitioners has never been the law in this country and is no more supported by precedent than by logic. As Justice Holmes said almost 80 years ago: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908), *overruled on other grounds*, *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

¹⁴ One example of the many types of cases which would be affected by petitioners' reading of the Contract Clause is *Arcara v. Cloud Books*, ____ U.S. ____, 54 U.S.L.W. 5060 (July 7, 1986). In that case, this Court sustained the closing of an "adult" bookstore in which illicit sexual activities were occurring. The New York statute at issue prohibited for one year the use "for any purpose" of a place found to be a public nuisance. The bookstore operators in *Arcara* raised only a First Amendment claim. If, however, petitioners' theory of the Contract Clause were to be adopted, *Arcara* might become a Contract Clause case, provided only that the bookstore had been leased. "Destruction" of the lease by the application of the statute would lead inexorably to the requirement that the courts use the "reasonable and necessary" test as proposed by petitioners, and the courts would need to decide, *inter alia*, whether the prohibition of all use for one year was "necessary" or whether some alternative, lesser destructive of contract rights, perhaps a six-month closing or an injunction against continued illicit sexual activity, would suffice. See Brief of Petitioners at 46-47. This is the type of judgment which this Court has long left to other branches of government.

B. Petitioners Attempt to Confuse the Tests Employed by This Court in Enforcing the Contract Clause.

In cases involving state statutes affecting contracts, this Court has developed a "reasonable and necessary" test to decide whether the statute is valid. See, e.g., *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1973).

Petitioners rest virtually their entire argument on the firm assertion, supported by one citation, that this test should be employed in an identical fashion in cases involving private contracts, in the event those contracts have been destroyed rather than merely impaired, as it is in cases involving impairment or destruction of contracts between the state and a private party.

"When, as here, there is not just severe impairment but complete destruction of substantive contract rights, then the full 'reasonable and necessary' test developed by this court in [*Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934)], and reaffirmed and augmented in [*United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977)] and [*Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978)], should be applied to determine whether an impairing state law survives Contract Clause scrutiny. See *U.S. Trust*, 431 U.S. at 25 (applicability of full test to impairment of private contracts)." Brief of Petitioners at 37 (emphasis added).

The key word in this sentence is "should," for no decision of this Court has ever so held.

Petitioners rely very heavily on language taken from *Home Bldg. & L. Assn. v. Blaisdell*, 290 U.S. 398 (1934). That case, however, *sustained* a state statute impairing only the duty to pay money,¹⁵ and made it very clear that the Contract Clause does not impede the state from acting within the scope of its traditional police powers to protect the public from acts threatening injury to the health of the state and its citizens:

¹⁵ Since the contracts involved were purely financial, the traditional core of the police power, the power of the state to prevent one person from using his property to harm another, was not implicated. The same is true of *Allied Structural Steel v. Spannaur*, 438 U.S. 234 (1978) and *United States Trust Co. v. New Jersey*, *supra*, both of which are also relied upon heavily by petitioners.

"The States retain adequate power to protect the public health against the maintenance of nuisances despite insistence upon existing contracts . . . Legislation to protect the public safety comes within the same category of reserved power. . . ."

"[W]here the protective power of the State is exercised in a manner otherwise appropriate in the regulation of a business it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices. . . ." 290 U.S. at pp. 436-438 (emphasis added).

In explaining the relationship between these principles and the challenge before it to a statute which temporarily abrogated certain contractual provisions in order to provide financial relief for a class of private parties, the Court said:

"The reservation of state power appropriate to such extraordinary conditions may be deemed to be as much a part of all contracts, as is the reservation of state power to protect the public interest in the other situations to which we have referred. . . ." 290 U.S. at 439 (emphasis added).

Those "other situations" are precisely what are involved here. Thus, the *Blaisdell* court clearly distinguished between the exercise of the state's traditional police powers to prevent "injurious practices" and the exercise of emergency powers to suspend the operation of otherwise harmless contracts. With respect to the former, the court clearly believed them entirely unimpeded by challenges under the Contract Clause alleging impairment of private contracts.

Even the *cited* page of *U.S. Trust*, a case involving state impairment of contracts to which the government was a party, actually shows the Court's commitment to deference in cases not involving state contracts:

"The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate

because the State's self-interest is at stake." *United States Trust Co. v. New Jersey*, *supra*, 431 U.S. at 25-26 (emphasis added; footnotes omitted).

The obvious corollary is that in cases *not* involving the state's purse, "complete deference to a legislative assessment of reasonableness and necessity" *is* appropriate.¹⁶ Petitioners' refusal to recognize this distinction between contracts with the state and wholly private contracts is the source of petitioners' castigation of the courts below for failing to review the state actions at issue pursuant to a very strict standard of "reasonableness" and "necessity." It is petitioners, not the lower courts, who misunderstand the law.

CONCLUSION

For the foregoing reasons, amici curiae respectfully submit that the decision of the Court of Appeals for the Third Circuit should be affirmed.

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¹⁶ See also, *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 412-13 (1983) explaining the distinction between contracts with the government and between only private parties and also explaining that in *Allied Structural Steel v. Spannaur*, *supra*, 438 U.S. 234, the statute in question had not been aimed at an "important general social problem."